(1)

No. 90-8466-CSY
Status: GRANTED
CAPITAL CASE

Title: David Riggins, Petitioner
v.
Nevada

Docketed:
June 13, 1991

Court: Supreme Court of Nevada

Counsel for petitioner: Yampolsky,Mace

Counsel for respondent: Tufteland,James

Entry	Date	Note	Proceedings and Orders
1	Jun 13 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 17 1991		Brief of respondent Nevada in opposition filed.
4	Jul 25 1991		DISTRIBUTED. September 30, 1991
5	Aug 5 1991	X	Reply brief of petitioner David Riggins filed.
6	Aug 13 1991		Record requested.
7	Aug 22 1991		Record filed.
		*	Supreme Court of Nevada-6 vol.
9	Oct 7 1991		Petition GRANTED.
			**********
11	Nov 18 1991		Brief amicus curiae of Nevada Attorneys For Criminal Justice filed.
10	Nov 20 1991		SET FOR ARGUMENT WEDNESDAY, JANUARY 15, 1992. (1ST CASE)
12	Nov 21 1991		Brief amicus curiae of American Psychiatric Association filed.
13	Nov 21 1991		Brief amicus curiae of Coalition for Fundamental Rights of Equality of Ex-Patients filed.
14	Nov 21 1991		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
15	Nov 26 1991		Brief of petitioner David Riggins filed.
16	Nov 26 1991		Joint appendix filed.
17	Nov 27 1991		CIRCULATED.
18	Dec 5 1991		CIRCULATED.
19	Dec 23 1991	X	Brief amici curiae of Louisiana, Delaware and Maine filed.
20	Dec 23 1991	X	Brief of respondent Nevada filed.
21	Jan 6 1992		Record filed.
		*	Exhibits received Supreme Court of Nevada. Original photographs, Exhibits 5, 8-16, 18-21 and 39.
22	Jan 8 1992	X	Reply brief of petitioner David Riggins filed.
23	Jan 15 1992		ARGUED.

NO. 90-8200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19__

* * * * * * * * * * *

DAVID E. RIGGINS, Petitioner

vs.

STATE OF NEVADA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEVADA

Respectfully submitted,

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Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether forced medication during trial violates a defendant's constitutional right to a full and fair trial.

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TABLE OF AUTHORITIES

520 South 4th Street
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19___

* * * * * * * * *

DAVID E. RIGGINS, Petitioner

vs.

STATE OF NEVADA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEVADA

David E. Riggins petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Nevada.

OPINION BELOW

The Order of the Nevada Supreme Court is attached to this Petition as Exhibit "A".

JURISDICTION

The Judgment of the Nevada Supreme Court was entered March 28, 1991 (Exhibit "A"). This Petition For Writ of Certiorari was filed within the statutorily prescribed time period after a Motion To Stay Remittitur pending a Writ of Certiorari was granted by the Nevada Supreme Court on April 15, 1991 (Exhibit "B"). The Court also granted a motion extending the Stay until June 15, 1991 (Exhibit "C"). This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> . . .nor shall any person be compelled in any criminal case to be a wintness against himself, nor be deprived of life, liberty, or property without due process of law.

2. The Eighth Amendment to the United States Constitution demands that cruel and unusual punishment shall not be inflicted.

3. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . .nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

DAVID EDWARD RIGGINS was arrested on November 20, 1987. Shortly after his arrest he was medicated with 25 milligrams of Mellaril per day under advisement of the prison psychiatrist. On December 14, 1987, Mace J. Yampolsky, Esq., was appointed as Counsel for Defendant (ROA 277). DAVID RIGGINS was charged, by information filed April 5, 1988, with Robbery With Use of a Deadly Weapon, N.R.S. 200.380, N.R.S. 193.165, and Murder with Use of a Deadly Weapon, N.R.S. 200.010, N.R.S. 200.030, N.R.S. 193.265 (ROA 48). A Preliminary Hearing was held March 25, 1988 before the

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Honorable Daniel E. Ahlstrom, Justice of the Peace (ROA 295). Defendant was bound over on two counts, Robbery with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon to District Court (ROA 399).

On January 20, February 17, 18, 19, 24 and March 9, 1988, Defendant's Arraignment was held before the Honorable Judge James Brennan in the Clark County District Court (ROA 47). On March 9, 1988, after being examined by three psychiatrists, defendant RIGGINS was found competent to stand trial. Dr. Jack Jurasky opined that defendant RIGGINS was incompetent, but Dr. William O'Gorman and Dr. Franklin Master decided DAVID RIGGINS was competent. He was being medicated with Mellaril at the time he was examined.

A Motion for Individual Sequestered Voir Dire was filed on June 9, 1988, but was denied (ROA 52, 108). On June 10, 1988, defense counsel submitted a notice of insanity defense. Also on June 10, 1988, a Motion to Terminate the Administration of Medication was filed, and denied, and an Ex Parte Motion to Allow Defendant to Wear Civilian Clothes During the Trial was filed, and granted (ROA 63). In addition, an Ex Parte Motion for an Order Appointing Co-Counsel was filed September 30, 1988, and was denied (ROA 124, 127).

A jury trial was held November 7, 8, 9, 14, and 15, 1988 before the Honorable Judge James Brennan (ROA 512-919). Defendant RIGGINS was convicted of Robbery with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon (ROA 275). The penalty hearing was held November 16 and 17, 1988, and the jury

sentenced the Defendant to DEATH by lethal injection (ROA 276). Defendant RIGGINS was sentenced to DEATH by lethal injection for Murder with use of a Deadly Weapon. Defendant was further sentenced to fifteen years imprisonment for Robbery, and fifteen years imprisonment for the Use of Deadly Weapon. The two sentenced in Count I were ordered to run consecutively but concurrently to the sentence imposed in Count II (ROA 276).

The instant appeal is from the Defendant's judgment of conviction.

STATEMENT OF FACTS

Early in the morning at 1:30 a.m. on Friday, the 20th of November, 1987, DAVID RIGGINS spoke to Paul Wade on the telephone to arrange a meeting to purchase some cocaine (ROA 529). Soon thereafter, RIGGINS asked his roommate, Lowell Pendrey, if he could borrow Pendrey's car to go to a friend's house. Pendrey would not allow RIGGINS to borrow his car, but offered to provide transportation to the friend's house (ROA 528). At approximately 2:00 a.m., RIGGINS and Pendrey drove to Paul Wade's apartment. RIGGINS went in alone, and left Pendrey waiting in the car (ROA 531). RIGGINS was in the apartment approximately 20 minutes, and returned to Pendrey's car with no change in his demeanor (ROA 534). Later that morning at approximately 3:00 a.m., Patricia Bezian, Paul Wade's girlfriend and roommate took her scheduled lunch break from work, and went home to find out why Wade was not answering the telephone (ROA 530). She found Wade lying on his stomach, dead

in a pool of blood (ROA 530). Paul Wade died of multiple cut and stab wounds to the head, trunk, and limbs (ROA 546). There were 32 stab wounds in all (ROA 533).

DAVID RIGGINS testified that he has been hearing voices since he was four years old, and that originally he thought they were aliens, but later found out from his minister that they were the devil, trying to possess his body (ROA 711). RIGGINS stated on the morning of the incident, he had gone over to Paul Wade's to buy some cocaine, and once inside the apartment, Wade began attacking RIGGINS with the knife. After Wade had been injured seriously, he told RIGGINS to leave and take his jacket with him (ROA 723).

RIGGINS stated that the homicide was justified because Wade had killed two little girls in the past, and had also tried to kill RIGGINS before by putting fiberglass in his water supply and by squirting his AIDS infected blood on cocaine before selling it to RIGGINS. Fiberglass in water to be used for shooting cocaine would cause blood clots and death (ROA 716, 723).

RIGGINS stated that he had been admitted to a mental institution six months prior to the incident, and had been given medication for his condition (ROA 740). RIGGINS stated that he was not on any prescription medications on the morning of the incident, but at trial was taking 800 milligrams of Mellaril per day (ROA 741).

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REASONS FOR GRANTING THIS WRIT

This case is important to Petitioner because he was medicated against his will which did not allow the jury to see his "true" demeanor. As a result of the denial of his constitutional rights he now faces death by lethal injection.

The death penalty may not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, (1976). Instead, the statutory scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). The Court has allowed each state to fashion its own statute as long as these general principles are followed. See, Jurek v. Texas, 428 U.S. 262 (1976), Proffitt v. Florida, 428 U.S. 242 (1976).

AUTHORITIES AND ARGUMENT

THE COURT'S REFUSAL OF DEFENDANT'S MOTION TO TERMINATE THE ADMINISTRATION OF MEDICATION VIOLATED DEFENDANT'S RIGHT TO A "FULL AND FAIR" TRAIL.

Prior to jury selection, defense counsel filed a Motion to Terminate the Administration of Medication. Defendant RIGGINS was under the influence of 800 milligrams of Mellaril per day. Mellaril is an antipsychotic drug, one of four major classes of psychotropic drugs used to treat mental illness. This

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medication violated DAVID RIGGINS' right to be free from bodily restraint, and ultimately his right to a "full and fair" trial. The medication denied DAVID RIGGINS the ability to assist in his defense. His demeanor, appearance and attitude were chemically cauterized and sanitized for the jury.

This is a case of first impression in Nevada, therefore, there is no applicable state case law on the subject. However, there are several other jurisdictions that have ruled on the 2subject.

Several cases have held that an individual has a due process right to freedom from arbitrary forcible administration of chemical restraints. Youngberg v. Romeo 102 S.Ct. 2458 (1982), Large v. Superior Court 148 Ariz. 229, 714 P.2d 399, U.S. v. Watson 893 F.2d 970 (8th Cir. 1990). The United States Supreme Court in Youngberg v. Romeo, Id. at 2458, held that liberty from bodily restraint as well as liberty from chemical restraint, has always been recognized as the core liberty protected by the Due Process Clause from arbitrary government action. This interest survives criminal conviction and incarceration. A similar decision was rendered in Large v. Superior Court, Id. at 406, where the Supreme Court of Arizona stated:

> "Notwithstanding his status as a convicted prisoner, petitioner retains the right to due process protection against arbitrary government action. Liberty from arbitrary chemical restraint survives criminal conviction and incarceration just as liberty from arbitrary bodily restraint survives both civil and involuntary commitment."

Defendant RIGGINS should not have been forced to take medication against his will, as his freedom from chemical

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restraint is protected by the Due Process Clause of the Fourteenth Amendment.

This court further stated:

> "The medical nature of the procedure does not justify dispensing with due process requirements. The mere fact that a doctor authorized the forcible administration of the drugs is not conclusive. Due process requires that courts 'make certain' that proper professional judgment was 'in fact' exercised in the denial of a liberty interest."

Although the administration of Mellaril to defendant RIGGINS was authorized by a psychiatrist, this does not ameliorate the fact that he was denied a liberty interest provided to him by the Fourteenth Amendment.

There are also at least two separate Fifth Amendment violations present in a state's decision to compel one who is presenting an insanity defense to be medicated in order to stand trial. First, such medication and the altered demeanor that accompanies it compels the defendant to be the instrument of his own conviction, thus violating the privilege against self-incrimination. Second, by effectively mandating the presentation of this altered demeanor, the state considerably lightens its own burden at trial, violating the fundamental precept of our adversarial system of justice that the state must shoulder the burden of proving its case against the individual. Fentiman, ***Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant,*** 40 U. Miami L.Rev. 1161.

By forcing DAVID RIGGINS to be medicated in order to stand trial, the State of Nevada violated his privilege against self-

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incrimination, while at the same time reduced its own burden to refute the insanity defense at trial.

An individual cannot be forcibly medicated with antipsychotic drugs unless he is a danger to himself or others, or unless there is an emergency situation. In Washington v. Harper 110 S.Ct. 1039 (1990), the U.S. Supreme Court held that, given the requirements of the prison environment, the Due Process Clause permits the state to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest. This is consistent with the decision of U.S. Court of Appeals in Bee v. Greaves 744 F.2d 1394 (1984), that due process requires that a qualified professional determine that the forcible administration of medication is, in his or her opinion, necessary to assure everyone's safety.

In the instant case the reason DAVID RIGGINS was medicated was never provided. He was medicated immediately after being taken into custody. There is no evidence defendant RIGGINS threatened to harm himself or anyone else. He appeared like a zombie to the jury throughout the entire trial.

Many courts have held that freedom from psychotropic medication is a right protected by the Due Process Clause of the Fourteenth Amendment. The United States Court of Appeals in U.S. v. Watson 893 F.2d 977 (8th Cir.), agreed with other courts that the substantive right to be free from unwanted bodily restraint includes the right to refuse psychotropic

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medications. Defendant RIGGINS had the right to refuse the medication, and by disregarding his request, the State of Nevada violated his Due Process rights.

The Due Process Clause of the Fourteenth Amendment includes liberty interest in the right to privacy, including the right to make one's own decisions about fundamental matters, the rights to personal dignity and bodily integrity, and the right to communicate ideas freely. Bee v. Greaves 744 F.2d 1391 (1984). The decision whether to accept treatment with antipsychotic drugs is of sufficient importance to fall within the category of privacy interests protected by the Constitution. DAVID RIGGINS was refused this right to make decisions regarding his body. He requested that the administration of medication be discontinued, and his request was denied.

According to the United States Court of Appeals in U.S. v. Charters 829 F.2d 479 (4th Cir. 1987), the government may not force an unconsenting individual to hazard the present danger of antipsychotic medication upon a mere supposition that at some future time the individual may become dangerous. Furthermore, unless it is determined that, without medication, a patient presents an immediate threat of violence that cannot be avoided through the use of less restrictive alternatives, there is no justification for the intrusion into fundamental liberties that forcible medication represents. No other alternatives were ever offered to defendant RIGGINS. Upon arrest he was immediately medicated

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with Mellaril and his dosages have been periodically increased, to the outrageous level of 800 milligrams of Mellaril per day.

If one is medicated throughout one's trial, while claiming an insanity defense, forcible medication of psychotropic drugs may alter one's demeanor in such a way that it would lead to misimpressions by the jurors. For instance, in U.S. v. Charters 829 F.2d 494 (4th Cir. 1987), the court held that if a defendant is heavily medicated during the trial, the jury may get a false impression of the defendant's mental state at the time of the crime. We believe that to be the case here. Defendant RIGGINS was medicated so heavily that he almost appeared comatose. Dr. Jack Jurasky, the defense psychiatrist, testified that DAVID RIGGINS consumed "enough Mellaril to tranquilize an elephant." (ROA 752).

Just as medication can create misimpressions about the defendant's insanity at the time of the crime, its effects can also cause other important misimpressions about the defendant's mental state. Two common side effects of antipsychotic drugs are akinesia which makes the defendant apathetic and unemotional, and akathisia which makes him agitated and restless. As a result, the jury may be misled by the demeanor of a defendant who appears not to care about the crime, the victim, or the proceedings or who appears overly anxious at particular moments.

Defendant RIGGINS exhibited akinesia. Throughout the

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trial he appeared apathetic and unemotional. This had a powerful effect on the jury. This was a man on trial for violently murdering someone, who had stabbed someone repeatedly, and it appeared to the jurors that he just didn't care. This image would remain in the juror's minds and did not support his insanity defense. This obviously prejudiced DAVID RIGGINS.

Some courts hold that an instruction to the jury as to the effects of the medication the defendant is currently being administered reduces the problem of the jury not seeing the defendant's "true" demeanor. However, as held by the U.S. Court of Appeals in U.S. v. Charters 829 F.2d 494 n.20 (4th Cir. 1987), a jury instruction cannot ameliorate the negative impact of antipsychotic drugs on a defendant's ability to consult with counsel. Although this type of instruction to the jury reduces the problem of the jury not seeing defendant RIGGINS' true demeanor, it still does not abolish any misimpressions or prejudices they may create about him.

The Supreme Court of Washington in Harper v. State 110 Wash.2d 876, 759 P.2d 361 (1988) recognized that competent adults have a right to determine what shall be done to their bodies. This right should extend to DAVID RIGGINS as he was adjudicated (chemically) competent to stand trial. He should have been competent to make decisions regarding his own body, but he was deprived of that right.

The Supreme Court of Washington also held in State v.

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Murphy, 56 Wash.2d 761, 766-67, 355 P.2d 323, 327 (1960), "that a new trial be granted in the event of a showing by the accused, of a reasonable possibility that his attitude, appearance, and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control." A new trial should be granted in this case as well, because the amount of medication defendant RIGGINS was administered has been clearly demonstrated to have a tranquilizing effect, which altered his demeanor and appearance in front of the jury.

The courts of the state of Washington also ruled on this subject in State v. Maryott, where the court stated that:

> "If the State may administer tranquilizers to a defendant who objects, the State then is, in effect, permitted to determine what the jury will see or will not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury's consideration of his mental condition." 6 Wash.App 96, 101, 492 P.2d 239, 242 (1971).

The State of Nevada, by medicating DAVID RIGGINS against his will, altered his demeanor and determined what the jury would see. As a result, the State of Nevada permitted the jury to see defendant RIGGINS in his medicated state only.

The Maryott court also stated that, "when mental competence is at issue, the right to offer testimony involves more than mere verbalization. The demeanor in court of one who has raised the issue of sanity is of probative value to the trier of fact." Id. The jury in the instant case never saw DAVID RIGGINS in his "normal" undrugged condition. Sanity was the only issue in the present case, and the triers

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of fact only saw the defendant's altered demeanor. Consequently, they were never exposed to his insanity which eventually resulted in his receiving a DEATH sentence.

The Maryott court also stated that "it is difficult to see a legitimate state interest in imposing drugs on a defendant who asks to be free from them." Id. at 103, 492 P.2d at 243. The court then went on to say that if controlling a possibly obstreperous defendant is the motive, two alternatives are suggested, "First, no control should be imposed until its need has been demonstrated. Second, the control which is imposed should insure an orderly trial with the least interference with a defendant's rights." Id.

In the present case, the court ignored both alternatives. No need was ever demonstrated for imposing the medication, and substantial interference with the defendant's rights occurred when the State inundated RIGGINS with "enough Mellaril to tranquilize an elephant." (ROA 752).

The State administered 800 milligrams of Mellaril per day during the trial against RIGGINS' will (ROA 740). Psychiatrist Jack Jurasky, an expert witness, testified that 800 milligrams per day is enough to tranquilize an elephant (ROA 752). Courts have held that an accused may not be tried when he is so drugged, because he is in effect, not there at all. Pledger v. United States, 272 F.2d 69 (4th Cir. 1959). Defendant RIGGINS' eyes were open, but nobody was home.

The Supreme Court of Vermont remanded the case of In Re Prey 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975) for a new

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trial where the defendant had been heavily drugged during the trial, and it was held that "it may well have been necessary, in view of the critical nature of the issue, to expose the jury to the undrugged, unsedated Gary Prey, at least insofar as safety and trial progress might permit." The jury in the present case should have been exposed to the "undrugged, unsedated" DAVID RIGGINS as far as safety and trial progress would have permitted, especially since his defense was his insanity at the time of the offense.

The facts of Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437 (1983), are similar to the present case. In Louraine, the defendant was not taking antipsychotic medication at the time of the homicide, but while in custody, was receiving antipsychotic medication in various forms and doses, among which was Mellaril. At trial, the defendant was under the influence of "heavy" or "maximum" dosages of Stelazine, another antipsychotic medication utilized for the management of the manifestations of psychotic disorders. Id. at 33, 453 N.E.2d at 441.

In Louraine, the Supreme Court of Massachusetts cited the "universally accepted rule that, when a defendant's sanity is at issue, the trier of fact is entitled to consider the defendant's demeanor in court." Id. at 34, 453 N.E.2d at 442. The court further stated, "if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked at the time of the crime, substantial capacity either to appreciate the wrongfulness of

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his conduct or to conform his conduct to the requirements of the law." Id. This appears to have occurred in the present case. DAVID RIGGINS looked apathetic and unemotional to the jurors. Therefore, they discounted testimony that he lacked the capacity at the time of the crime to appreciate the wrongfulness of his conduct. As a result, they sentenced him to DEATH by lethal injection, rather than providing him an opportunity for rehabilitation to overcome his mental illness.

According to the court in Matter of Orr 531 N.E.2d 73 (Ill.App. 4 Dist. 1988), a recipient may refuse medication absent an emergency situation unless under the **parens patriae** doctrine he has been adjudicated incompetent in a separate proceeding. Defendant RIGGINS was never found incompetent, although he was examined on defense's request. He was placed on medication and then examined and found to be competent to stand trial.

DAVID RIGGINS had no control over the antipsychotic medication being administered to him because his Motion to Terminate the Administration of Medication was denied. He was medicated against his will. There is no doubt that his attitude, appearance and demeanor were affected by the medication.

When the state insists on the medication of the insanity defendant as a condition of his being "competent" to stand trial, such compulsory medication lightens the state's evidentiary burden at trial, making it easier for the state

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to rebut the defendant's contention that he was insane at the time of the offense. This medication denies the defendant the evidence he needs to demonstrate convincingly his insanity, and deprives him of his right to be the master of his own fate, violating the basic constitutional precept of deference to personal autonomy. Fentiman, ***Whose Right is it Anyway?: Rethinking Competency to Stand Trial in the Light of the Synthetically Sane Insanity Defendant.*** 40 U. Miami L.Rev. 1168 (1986).

During trial, DAVID RIGGINS was under the influence of 800 milligrams of Mellaril per day. This medication violated his right to a "full and fair" trial by denying him the ability to assist in his defense, and by prejudicing his demeanor, appearance, and attitude to the jury.

The court's refusal of DAVID RIGGINS' Motion to Terminate the Administration of Medication, violated his right to a "full and fair" trial because the jury never saw his actual demeanor, which could have demonstrated his insanity. The overwhelming majority of case law supports this view.

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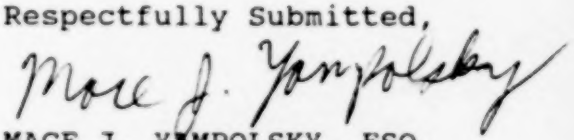
CONCLUSION

The State of Nevada drugged defendant RIGGINS into an unnatural state of chemical competency. The trial court allowed the State to drug defendant RIGGINS against his will into zombie-like competency, thereby depriving him of his right to a full and fair trial. This court should reverse the court below, and remand this case to the trial court and order a new trial of DAVID RIGGINS in an unmedicated state.

Respectfully Submitted,



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No. 90-8466

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID E. RIGGINS,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTION PRESENTED

Whether the denial of the Petitioner's motion to terminate his medication violated the Petitioner's constitutional right to a full and fair trial.

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STATEMENT OF THE CASE

The Petitioner was charged by way of an Information filed in the Eighth Judicial District Court, Clark County, Nevada, with one count of Robbery With Use of a Deadly Weapon and one count of Murder With Use of a Deadly Weapon. The Petitioner pled not guilty and not guilty by reason of insanity. Following a jury trial, the Petitioner was found guilty of both of the aforementioned crimes. On Count One, the Honorable James Brennan sentenced the Petitioner to serve fifteen (15) years on the Robbery charge and a consecutive fifteen (15) years on the Use of a Deadly Weapon enhancement. The jury sentenced the Petitioner to Death by lethal injection on the Murder With Use of a Deadly Weapon charge.

The Petitioner then appealed to the Nevada Supreme Court, raising six issues on appeal. The Nevada Supreme Court rejected his arguments and confirmed his convictions and sentences.

Petitioner now petitions this Court for a Writ of Certiorari.

STATEMENT OF FACTS

On November 20, 1987, Petitioner David Riggins rode with his roommate, Lowell Pendrey to the residence of Paul Wade in order to obtain a quantity of cocaine. While Pendrey remained in the vehicle, the Petitioner entered the residence and calmly emerged thirty (30) minutes later with a beer in his hand.

Shortly after Riggins left the apartment, Paul Wade's girlfriend, Patricia Bezian, called to make sure Wade was awake for work. She received a busy signal, so she continued to call every five minutes until 2:45 a.m. Because of the persistent busy signal, Miss Bezian became worried and called Mr. Wade's workplace. When she discovered that he had not reported for his shift, Miss Bezian immediately left her work at a local supermarket and returned to Wade's home at approximately 3:00 a.m.

Upon entering the residence, she encountered a horrifying scene. Paul Wade lay dead on the floor. Blood covered his ransacked bedroom, a bloody sheet hung in front of the window and the telephone had been torn out of the wall. After unsuccessful attempts to revive the victim, Miss Bezian frantically fled the apartment and used a neighbor's phone to call the police.

Wade had sustained thirty-two (32) direct stab wounds to the head, trunk and limbs. None of the thirty-two (32) wounds inflicted by the Petitioner was fatal; rather, the cause of death was most likely bleeding from all the wounds. Further, a triangular piece of steel was discovered embedded in the back of Paul Wade's skull. This piece of metal was later determined to be the tip of a knife that was subsequently seized from the Petitioner's bedroom.

On November 22, 1987, the Petitioner was arrested by the Las Vegas Metropolitan Police Department. He was charged and ultimately convicted of First Degree Murder and Robbery, both With the Use of a Deadly Weapon.

While incarcerated in the Clark County Jail following his arrest, the Petitioner was examined by Dr. Edward Quass, a psychiatrist for the Las Vegas Medical Center. Though Dr. Quass felt that Riggins was rational and coherent, the Petitioner claimed that he was hearing voices and had been for some time. Following a thorough examination, Dr. Quass prescribed Mellaril, an antipsychotic medication, primarily because the Defendant stated that he had used this prescription in the past with favorable results. Initially, the dosage was 100 milligrams (mg) per day, but it was increased to 800 mg at the time of the trial. Dr. Quass noted that

though this amount of Mellaril might make another patient groggy, it apparently did not affect the Petitioner in this manner. Finally, Dr. Quass stated that the Petitioner's appearance in court was not noticeably different from his unmedicated condition.

On January 24, 1988, the district court appointed Dr. Frank Master and Dr. Jack Jurasky to determine the competency of the Petitioner to stand trial. Initially, Dr. Master examined the Petitioner who stated that he was currently taking 450 mg of Mellaril per day and indicated that he had been using this medication for approximately six (6) years. Dr. Master also noted that the 800 mg dosage administered to the Petitioner at trial could have been a result of his increased tolerance to the medication because of extended use of Mellaril and additional drug abuse. The doctor indicated that if the Petitioner was taken off Mellaril, he might become psychotic and require several months of medication to return to a competent state. Finally, Dr. Master testified that if the Petitioner remained on this medication he would be competent.

Dr. Jack Jurasky also examined the Petitioner for competency. The doctor felt that the Petitioner was actively psychotic and if taken off the Mellaril, he would most

likely regress to manifest psychosis and become extremely difficult to handle. Further, he noted that, although the medication enhanced the Petitioner's ability to take part in court proceedings, nevertheless, the Petitioner was still not competent to assist counsel at trial. He also was of the view that Petitioner did not comprehend right from wrong at the time of the crime.

Dr. O'Gorman originally examined the Petitioner in September of 1982. This examination revealed a considerable degree of nervous trouble due mainly to excessive use of hallucinogenic drugs. Dr. O'Gorman thus prescribed 40 mg of Mellaril per day to reduce anxiety.

In March of 1988, subsequent to a court order, Dr. O'Gorman examined the Petitioner to determine his competency to stand trial. The Petitioner did not demonstrate any gross psychotic reactions and appeared knowledgeable regarding the events that lead to his incarceration. Though medicated with large doses of Mellaril, Dr. O'Gorman felt that there would be no effect on the Petitioner's ability to assist and communicate with his counsel at trial.

Dr. O'Gorman noted that because of his long drug history, the Petitioner would be more tolerant to medications and thus require higher disages. Finally, Dr. O'Gorman doubted

the veracity of the Petitioner's claims of hearing voices and attributed his noticeable disorganization to longtime chemical abuse. Ultimately, Dr. O'Gorman indicated that the Petitioner was cognizant of the difference between right and wrong when the murder took place.

SUMMARY OF THE ARGUMENT

The ruling of the Nevada Supreme Court does not conflict with established Nevada case law regarding the medication of a defendant at trial. In Ybarra, infra, the Court noted that competency may be attained through the use of medication.

The Petitioner has also failed to carry his burden of showing that the Nevada Supreme Court's decision is in conflict with the federal courts or any other state courts of last resort. Most of the cases cited by Petitioner are factually inapposite. Further, Petitioner's extensive reliance on United States v. Charters, 829 F.2d 479 (4th Cir. 1987), is completely inappropriate, inasmuch as this case was reversed in a rehearing en banc which Petitioner failed to note.

REASONS FOR DENYING THE WRIT

The Petitioner has failed to meet his burden of showing that this Court should exercise its supervisory jurisdiction because of a conflict between the decision of the Nevada Supreme Court and this Court or any United States Court of Appeals or any state court of last resort. Nor has the Petitioner presented any question of federal law that this Court should address. See Rules of the Supreme Court, Rule 10.1.

The State has shown that the Nevada Supreme Court's decision properly applied the law as proscribed by this Court and followed by other state courts of last resort. For these reasons, this Court should decline to exercise its discretionary jurisdiction in this case.

A R G U M E N T

THE DISTRICT COURT'S DENIAL OF THE PETITIONER'S MOTION TO TERMINATE HIS MEDICATION DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO A FULL AND FAIR HEARING

Petitioner alleges that his right to a fair trial was violated by the trial court's denial of his motion to terminate the administration of medication. In Nevada, the grant or denial of a motion is within the sound discretion of the trial court and will not be disturbed on review absent a clear showing of abuse of discretion. Sparks v. State, 604 P.2d 802 (Nev. 1980). Although the Petitioner has the right to a fair trial, this right is not absolute. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

The Nevada Supreme Court recently addressed a similar issue as that raised herein in Ybarra v. State, 731 P.2d 353 (Nev. 1987), cert. denied, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 390 (1985). There, the defendant argued that he did not receive a fair trial due to the medication that he was under at the time of the trial. Id. at 356-357. Relying

on State v. Murphy, 355 P.2d 323 (Wash. 1960), Ybarra argued that a criminal defendant who is tried while medicated or sedated is denied due process. The Nevada Supreme Court rejected this argument, noting:

> However, the majority of courts that have considered the issue have held that competency may be attained through the use of medication. See, e.g., State v. JoJola, 553 P.2d 1296, 1299-1300 (N.M. Ct. App. 1976); State v. Buie, 254 S.E.2d 26, 28 (N.C. 1979), cert. denied, 444 U.S. 971 (1979); Ake v. State, 663 P.2d 1, 6-7 (Okla. Crim. App. 1983), rev'd on other grounds, Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Law, 244 S.E.2d 302, 305-308 (S.C. 1978); State v. Stacy, 556 S.W.2d 552, 557-559 (Tenn. Crim. App. 1977); State v. Hayes, 389 A.2d 1379 (N.H. 1978).

State v. Jojola, 553 P.2d 1296 (N.M. Ct. App. 1976), is particularly instructive to the case at bar. In that case, the defendant's condition was diagnosed as schizophrenia of the paranoid type and he was given an antipsychotic medication, Thorazine. The medication was continued through trial and the appellate court rejected the defendant's contention that he had "an absolute right to be tried free from the influence of Thorazine." 553 P.2d at 1299.

Petitioner's reliance on Murphy, supra, is misplaced. In Murphy, the drugs at issue were tranquilizers rather than antipsychotics. In addition, these drugs were given to the

defendant by a fellow prisoner to treat the defendant's severe cold and not because the defendant was psychotic. Further, the Washington Supreme Court stated:

> We do not intend to suggest that a new trial be granted in every criminal case -- or even in every capital case -- where the appearance of the accused before the jury is marred by some mental, physical or emotional impairment . . . Each case of this type must be decided on its own facts.

Murphy, 355 P.2d 323, 325 (Wash 1960).

Here, the record shows that the Petitioner actively participated at his trial, testifying at length and in detail about the events surrounding the murder of Paul Wade. Additionally, Psychiatrist Dr. Edward Quass noted that the doses of Mellaril did not seem to affect the Petitioner. Dr. Quass felt his medicated in-court appearance and unmedicated demeanor were virtually identical. Finally, nothing in the trial transcript suggests that the Defendant's mental capacity was impaired. In fact, there is evidence that it was enhanced.

The Petitioner's reliance on State v. Maryott, 492 P.2d 329 (Wash. 1971), is also misplaced. In Maryott, the defendant was given substantial doses of Sparine, Librium and Chloral Hydrate by his jailers. There was no showing that this medication was ordered by the court either on its

motion or as the result of a hearing. Even at trial, the defendant was noted to be sitting hunched over and staring vacantly ahead. Maryott, supra, at 240.

Absent any showing on the record of an objective reference to the Petitioner's allegedly "drugged state," his assertion of the denial of a fair trial based on mere allegations must fail. Petitioner's assertion that 800 mg of Mellaril would be enough to "tranquilize an elephant" is taken out of context when compared to the testimony of two psychiatrists stating the need for an increased dosage based on the development of a tolerance to the drug over the years, particularly as persons with longstanding drug histories develop higher tolerances for all chemicals.

The prosecutor further established, by two psychiatrists' testimony, that had the Petitioner been taken off his medication he may have become psychotic and required several months of medication to return him to a competent state. One of the psychiatric experts even testified that the Petitioner would be competent if he stayed on the Mellaril medication. As Nev. Rev. Stat. (NRS) 178.400(1) states: "A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." The trial court, far from abusing its discretion in denying the Defendant's

motion, took an affirmative act to ensure the Defendant his constitutional rights.

The Petitioner's reliance on In Re Prey, 336 A.2d 174 (Vt. 1975), is also distinguishable. In that case, the defendant was granted a new trial because the fact that he was under the influence of medication was not revealed to the jury. In the present case, both the fact that the medication was being administered and its effect upon the Defendant were fully imparted to the jury by the testimony of the medical witness.

The Petitioner places reliance on Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983), which stated that the defendant was entitled to be tried in his unmedicated state to facilitate proof of his insanity defense because the trier of fact is entitled to consider the defendant's demeanor in court. Id. at 442.

This case is initially distinguishable because Massachusetts does not adhere to the M'Naghten test utilized in Nevada. See Ford v. State, 717 P.2d 27 (Nev. 1986). The Massachusetts Court utilizes a much broader test which "relieves the defendant of criminal responsibility if, at the time of the conduct, as a result of mental disease on defect, he lacked substantial capacity to conform his conduct

to the requirements of the law." Louraine, supra, at 444, n. 12, citing, Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967). The defendant's demeanor at trial could be deemed to have some relevance under this broader test and the Massachusetts Court specifically adopted the test to permit a wider range of testimony to be received. Id. at 560. However, in Nevada, where the narrower M'Naghten test is the test for insanity, the defendant's demeanor at trial is clearly less probative in determining his sanity at the time of the commission of the crime.

Furthermore, the reasoning utilized by the Massachusetts Court is flawed. A defendant's trial demeanor does not significantly reflect his state of mind at the time of the crime. The issue at trial is whether at the time the crime was committed, the defendant understood and comprehended the difference between right and wrong. Thus, merely because the Petitioner's demeanor might be altered by antipsychotic medication does not preclude him from asserting an effective insanity defense. The most sensible approach is to allow the state to administer proper medication to the defendant to assist in his understanding of the proceedings while at the same time affording the defendant the opportunity to apprise the jury of the effects of the medication. See

"'Mind Control', 'Synthetic Sanity', 'Artificial Competence' and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication." 12 Hofstra L. Rev. 77 (1984). This is precisely what the Nevada trial court did in the case at bar.

The Petitioner's heavy reliance on United States v. Charters, 829 F.2d 479 (4th Cir. 1987), is completely inappropriate since this case was reversed in a rehearing en banc, United States v. Charters, 863 F.2d 302 (4th Cir. 1988). Following the rehearing, the Court noted that persons legally confined are not entirely stripped of all constitutionally protected interests. They retain significant interests, but they are not absolute, Id. at 305, citing, Youngberg v. Romeo, 457 U.S. 307, 315, 319-320, 102 S.Ct. 2452, 2457, 2459-2460, 73 L.Ed.2d 28 (1982).

Subsequently, the Court supported a procedure which placed the base line decision to medicate with the appropriate medical personnel of the custodial institution and provided judicial review to guard against arbitrariness. Charters, 863 F.2d at 307-308. A scheme similar to the one articulated in Charters was recently upheld as comporting with due process by this Court and the Fourth Circuit Court of Appeals. Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61

L.Ed.2d 101 (1979); Johnson v. Silvers, 742 F.2d 823 (4th Cir. 1984). Clearly, the scheme presented in the second Charters case parallels the procedures which transpired in the case at bar.

Furthermore, the decision of the Nevada Supreme Court in State v. Riggins, 808 P.2d 535 (Nev. 1991), is squarely in line with the majority of states which have addressed this issue. In Mines v. Florida, 390 S.2d 332 (Fla. 1980), the Supreme Court of Florida in affirming the defendant's conviction for first degree murder held:

> The fact that appellant's competency is the result of approved medical treatment and medical science does not invalidate that finding of competency. To hold as suggested by appellant's counsel would mean that an individual with a mental disorder which could be controlled by medical science could not be tried for a criminal offense regardless of his ability to comprehend the nature of the proceedings and to assist counsel in his own defense.

Id. at 335. In Mines, supra, the defendant was diagnosed as schizophrenia of a paranoid type and was recommended treatment with a strong tranquilizing drug.

South Carolina addressed this issue in State v. Law, 244 S.E.2d 302 (S.C. 1978). In that case, the defendant's conviction for murder and the trial court's finding of competency were affirmed on appeal. The defendant was involuntarily

medicated on psychotropic medications including Holdol and Loxatain, and he alleged error because the medication affected his demeanor.

The South Carolina Supreme Court held that:

> While it is true the medications do affect cognitive and communicative processes, the effect is beneficial in that it enabled the appellant to effectively exercise the very rights he asserts he was denied. . . . It is our view that medication may be administered without the consent of a defendant under compelling circumstances, including those where the medication is necessary to render a defendant competent to stand trial.

(Emphasis added). Id. at 306-307. This is the situation with the Petitioner in the case at bar. The denial of the Petitioner's motion effectively enabled the Petitioner to exercise the very rights he now asserts he was denied.

As the conviction of an accused while legally incompetent violates due process and must be set aside, Miller v. State, 517 P.2d 182 (Nev. 1973), the trial court in effect, ensured that a violation of the Petitioner's due process rights did not occur by denying the motion. Doubt as to the sanity of a defendant means doubt in the mind of the trial court rather than counsel or others. Williams v. State, 451 P.2d 848 (Nev. 1969).

In his Petition, counsel for Petitioner makes numerous factual assertions which are not correct or are beyond his knowledge. For instance, on page 13 of his Petition he states, "[Riggins] appeared like a zombie to the jury throughout his trial." The trial record does not reflect any such observation. In fact, the testimony of the psychiatrists refutes such a contention.

On page 15, he states, "Defendant RIGGINS was medicated so heavily that he almost appeared comatose." There is no support in the record for such a reckless allegation. Petitioner's present counsel was also trial counsel. It is inconceivable that counsel would proceed with the trial if his client was truly in a zombie-like condition or almost comatose. Further, if those terms reflect Riggins trial demeanor then he would have been incapable of testifying in his own behalf.

On page 20, he states, "DAVID RIGGINS looked apathetic and unemotional to the jurors. Therefore, they discounted testimony that he lacked the capacity at the time of the crime to appreciate the wrongfulness of his conduct." First, the record does not reveal that Petitioner looked apathetic and unemotional. Even if the record did so reflect, given the heinous nature of the murder, such trial demeanor could well be viewed by jurors as supportive of an insanity defense.

From the statement, counsel then leaps to the unreasonable conclusion that the members of the jury discounted Petitioner's testimony that he lacked capacity to know right from wrong at the time of the crime.

The record in this case reveals that Riggins was alert during trial, was able to assist counsel with his defense and testified before the jury.

CONCLUSION

In Nevada, a criminal defendant must be found competent before he may proceed to trial. NRS 178.400. If a medicated detainee awaiting trial in this state has an absolute right to appear before a jury in an unmedicated condition, than such a defendant who becomes incompetent when unmedicated could effectively thwart the prosecution of the case by demanding to appear in court unmedicated.

The position adopted by the Nevada Supreme Court in this case was reasonable and not violative of Petitioner's constitutional rights. The trial court allowed extensive testimony regarding Riggins' psychological profile and the effects of Mellaril upon him. The trial court's ruling denying Defendant's Motion to Terminate Medication was not erroneous. The Nevada Supreme Court's decision affirming

the district court's ruling was correct. There is no need for this Court to enunciate a uniform, bright-line rule that fails to take into account differences in state law. The Petition for Writ of Certiorari should be denied.

Dated this 17th day of July, 1991.

Respectfully submitted,

JAMES TUFTELAND
Chief Deputy
Attorney for Respondent
REX BELL
District Attorney
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * * *

DAVID E. RIGGINS, Petitioner/Appellant,	
v.	
STATE OF NEVADA, Respondents	Nevada Supreme Court No. 19873

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, DAVID E. RIGGINS asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been determined to be indigent and has been represented by appointed counsel in the Nevada Supreme Court.

Petitioner's affidavit in support of this motion is attached hereto.

DATED this 24 day of JUNE, 1991.

Respectfully Submitted,

MACE J. YAMPOLSKY, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA to the attorney of record listed below on this 17th day of July, 1991.

MACE J. YAMPOLSKY, ESQUIRE
Attorney at Law
520 South Fourth Street
Las Vegas, Nevada 89101

Employee, Clark County
District Attorney's Office

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

* * * * * *

DAVID E. RIGGINS,
Petitioner/Appellant

v.

STATE OF NEVADA,
Respondent

Nevada Supreme Court
No. 19873

Affidavit in Support of Motion to Proceeed on Appeal in Forma Pauperis

I, DAVID E. RIGGINS being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of My Motion to Proceed in this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in the Petition for Writ of Certiorari are valid.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed? A) If the answer is yes, state the amount of your salary or wages per month and

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give the name and address of your employer. B) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? A) If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

N/A

3. Do you own any cash or checking or savings accounts? (If the answer is yes, state the total value of the items owned).

N/A

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? If the answer is yes, describe the property and state its approximate value.

N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

N/A

Dated: June 19, 1991

By: David E. Riggins

VERIFICATION

Pursuant to NRS 15.010, under penalties of perjury, the undersigned declares that he is the petitioner, named in the foregoing Affidavit and knows the contents thereof; that the Affidavit is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters, he believes it to be true.

David E. Riggins
DAVID E. RIGGINS

SUBSCRIBED AND SWORN to before me this 19th day of June, 1991.

Zoetta J. Waggener
NOTARY PUBLIC in and for said County and State.

ZOETTA J. WAGGENER
Notary Public - State of Nevada
Washoe Pine Co. - Nevada
APPT. EXP. AUG-3-94

ORIGINAL

No. 90-8466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * * *

DAVID E. RIGGINS, Petitioner,

vs.

STATE OF NEVADA, Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

Respectfully Submitted,

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QUESTION PRESENTED FOR REVIEW

Whether forced medication during trial violated Petitioner's constitutional right to a full and fair trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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No. 90-8466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * * *

DAVID E. RIGGINS, Petitioner,

vs.

STATE OF NEVADA, Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEVADA

STATEMENT OF THE CASE

Petitioner reasserts the statement of the case as set forth in the original Petition for Writ of Certiorari.

STATEMENT OF THE FACTS

Petitioner reasserts the statement of the facts as set forth in the original Petition for Writ of Certiorari, however, Petitioner disagrees with various segments of Respondent's statement of the facts. Respondent alleges that Psychiatrist Dr. Edward Quass stated that Petitioner RIGGINS' appearance in court was not noticeably different from his unmedicated condition. How Dr. Quass could make

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such a statement is unknown to Petitioner, as Dr. Quass did not even examine Petitioner RIGGINS during the trial.

Respondent also alleges that Psychiatrist Dr. Franklin Master noted that the 800mg dosage of Mellaril administered to Petitioner at trial could have been a result of his increased tolerance to the medication because of extended use of Mellaril and additional drug abuse. Dr. Master never mentioned drug abuse. At the hearing on the Motion to Terminate the Administration of Medication, Dr. Master explained that he did not know why Petitioner's dosage had been increased to 800mg per day from 450mg per day, but that he assumed that whoever increased it must have seen a reason to increase it. He did not mention the effects drug abuse would have on an individual's tolerance to Mellaril, however he did state that he believed tak ng RIGGINS off the Mellaril would have no noticeable effect.

The State failed to mention Dr. Jack Jurasky's statement during trial that RIGGINS may have a tolerance for certain narcotics, but not necessarily for Mellaril (ROA 256). Dr. Jurasky also stated that injecting cocaine would release whatever is pathological in DAVID RIGGINS (ROA 249).

ISSUE ADDRESSED IN REBUTTAL

I. WHETHER FORCED MEDICATION DURING TRIAL VIOLATED PETITIONER'S CONSTITUTIONAL RIGHT TO A "FULL AND FAIR" TRIAL

Petitioner RIGGINS was under the influence of 800

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milligrams of Mellaril throughout his trial. This medication violated his right to be free from bodily restraint, and ultimately his right to a "full and fair" trial. Throughout the State's Brief in Opposition to Petitioner's Writ of Certiorari, the State continuously referred to the competency of Petitioner RIGGINS. Competency is not the issue. The State has failed to address the correct issue in it's Brief in Opposition to Petitioner for Writ of Certiorari.

The State begins by citing Ybarra v. State, 103 Nev.8, 731 P.2d 353 (1987), cert. denied, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 390 (1985). The State's reliance on Ybarra is misplaced. The issue in Ybarra was whether competency can be attained through the use of medication. This is not the issue in the present case. RIGGINS was deemed competent to stand trial. The issue in the case at bar is whether forced medication during trial deprives one of their constitutional right to a "full and fair trial".

The State next relies on State v. Jojola, 89 N.M. 489, 553 P.2d 1296 (N.M. Ct.App. 1976). Reliance on this case is also misplaced. The Court in Jojola conceded that in certain cases courtroom demeanor would be relevant in issues decided by the jury, such as the insanity defense, and the penalty for first degree murder. Id. at 1300. The case at bar is an insanity defense, and thus would meet the standard in Jojola as being a case in which the defendant's demeanor

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is relevant.

The State tries to distinguish State v. Murphy, 56 Wash.2d 761, 355 P.2d 323 (1960) by stating that the drugs at issue in Murphy were tranquilizers rather than antipsychotics, and by stating that these particular drugs were given tc the defendant by a fellow prisoner rather than by a physician. The status of the person administering the drug or the specific type of drug in question is not the issue in the present case. The constitutionality of forced medication throughout trial is the issue, which the State conveniently seems to sidestep.

The State also attempts to distinguish State v. Maryott, 6 Wash.App. 96, 492 P.2d 239 (1971), by stating that the medication in Maryott was not ordered by the Court. However, the person ordering the medication is not relevant, the forcible administration of medication throughout trial is.

The State alleges that Psychiatrist Dr. Edward Quass noted that the doses of Mellaril did not seem to affect the Petitioner. The State alleges this, yet they fail to specify when Dr. Quass made this statement regarding RIGGINS' reaction to the Mellaril. At the Hearing on the Motion to Terminate the Administration of Medication what Dr. Quass stated was that the administration of Mellaril did not affect RIGGINS' competency to stand trial. At trial Dr. Jack Jurasky testified that RIGGINS would resort to hearing

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voices and reacting to them without the Mellaril (ROA 248). This statement conflicts with Dr. Quass' statement that the Mellaril did not affect the demeanor of Petitioner RIGGINS.

The State further claims that there is evidence that Petitioner's mental capacity was enhanced during trial. Again the State fails to show any proof of their statement. There was no evidence showing that DAVID RIGGINS' mental capacity was enhanced by the Mellaril. RIGGINS, when questioned during trial, claimed that the Mellaril did not help him to understand what is taking place in court on any particular day (ROA 237).

Respondent next argues that In Re Prey, 336 A.2d 174 (Vt. 1975), is distinguishable because in that case the jury did not know the defendant was under the influence of medication, whereas in the case at bar the jury was informed of the medication Petitioner RIGGINS was being administered. Although the jury in the present case knew of the effects of the medication being administered to DAVID RIGGINS, seeing is believing. If the jury were to have seen RIGGINS' true demeanor, the impact would have been magnified so that it would have played an important part in their deliberations.

The State then tries to distinguish Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983) because Massachusetts does not adhere to the M'Naghten test utilized in Nevada, and at the same time refers us to Ford v. State, 717 P.2d 27 (Nev. 1986). The issue of whether or not a state adheres

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to the M'Naghten test is irrelevant.

A defendant's undrugged demeanor which was the same as when he committed an offense is always relevant to an insanity defense, regardless of the test a particular state utilizes in determining such insanity. Petitioner's undrugged demeanor was never demonstrated to the jury. RIGGINS testified at trial that he was not under any medication the night of the killing, but he was presently taking 800mg per day of Mellaril during trial (ROA 235).

Respondent's reference to Ford, in this case is inappropriate. Ford supports Petitioner's argument. The Court in Ford sustained defendant's objection to the continuation of mandatory injection of antipsychotic medication during trial, and granted mandamus directing the district court to vacate its order enforcing the administration of such drugs to Mrs. Ford. Id. at 32. The Court's decision denying the State the right to impose continued antipsychotic drug therapy on the protesting defendant was based upon the fact that Mrs. Ford had been determined to be mentally competent to stand trial and was thus outside the purview of Nevada's statutes mandating detention and psychiatric treatment. This case addresses the real issue of the case at bar, not simply Petitioner's competency. RIGGINS was determined to be mentally competent to stand trial, and therefore he should not have been mandatorily inundated with Mellaril against his will.

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Although United States v. Charters, 829 F.2d 479 (4th Cir. 1987) was remanded with directions in a rehearing en banc, United States v. Charters, 863 F.2d 302 (4th Cir. 1988), it was not reversed, and therefore Petitioner's reliance on the case is not inappropriate. The Court remanded the case with directions to support a procedure which placed the base line decision to medicate with the appropriate medical personnel of the custodial institution. This is not the issue in the case at bar, so the fact that the case was remanded with those particular directions, is irrelevant.

The Charters Court also did not overrule their previous holding that a jury instruction cannot ameliorate the negative impact of antipsychotic drugs on a defendant's ability to consult with counsel. Although such an instruction to the jury would reduce the problem of the jury not seeing RIGGINS' true demeanor, it still would not abolish any misimpressions or prejudices they may create about him. The Charters Court also noted that, based in part upon the Supreme Court's recognition in Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), of a protectible liberty interest in freedom from bodily restraint, that "the forcible administration of antipsychotic drugs presents a sufficiently analogous intrusion upon bodily security to give rise to such a protectible liberty interest." They then concluded that

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Charters possessed that constitutionally protected retained interest.

The State cites Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) as a case with a scheme similar to U.S. v. Charters. Petitioner fails to see the similarity in these two cases. Parham, is a case involving forced admission of minors into mental facilities. Charters is a case pertaining to adults already admitted into mental institutions. Parham is differentiated from the case at bar, as it concerns minors rather than adults, and because it does not even mention the issue of forced medication which is the issue in this case.

The State claims that the decision of the Court in State v. Law, 244 S.E.2d 302 (S.C. 1978), as well as the decision of the Court in Mines v. Florida, 390 S.2d 332 (Fla. 1980) are consistent with the decisions of the majority of states which have addressed the present issue. However, these two cases do not address the issue of the case at bar, they address the issue of competency. The constitutionality of forced medication throughout trial is the issue in the present case, not the competency of the defendant.

The State then argues that doubt as to the sanity of a defendant means doubt in the mind of the trial court rather than the counsel or others. Williams v. State, 451 P.2d 848 (Nev. 1969). This is exactly what Petitioner would like the

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trial court and the jury to see. If DAVID RIGGINS had not been forcibly administered Mellaril throughout his trial, the jury would have been able to see the "true" DAVID RIGGINS, and thus make a more knowledgeable decision as to his sanity. However, the jury never did see Petitioner's "true" demeanor, as can be supported by a statement of RIGGINS' roommate. RIGGINS' roommate, Thomas Austin stated during trial that RIGGINS was incoherent a few times, that he would hibernate in his bedroom and when he came out he would be flushed, incoherent, and beady eyed, and that he had a very strong sense of paranoia (ROA 187).

The State then attacks Petitioner's statements regarding RIGGINS' demeanor at trial. Petitioner stated that RIGGINS appeared zombie-like and almost comatose. The State claims that the trial record does not reflect any such observations. Of course it doesn't. Trial records do not usually make editorial comments about the demeanor of the parties at trial.

The State also argues that it would be inconceivable that counsel would proceed with trial if his client was truly comatose and zombie-like. Counsel had no choice in this situation. His Motion to Terminate the Administration of Medication was denied, and he had to proceed with his client "as he was" after being administered the Mellaril. As a result of the medication, Petitioner was unable to effectively assist counsel in his defense. This was

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evidenced by Petitioner's failure to read his own statement to the jury at his sentencing. Instead, defense counsel had to read the statement for him, reducing the impact of the statement upon the jurors who ultimately returned with the death penalty (ROA 446).

On page 17 the State again argues that the record does not reflect allegations that RIGGINS looked apathetic and unemotional. The State argues that even if the record did so reflect, given the heinous nature of the murder, such trial demeanor could well be viewed by jurors as supportive of an insanity defense. How can an apathetic and unemotional person charged with murder support an insanity defense? Jurors would look at RIGGINS' calm and controlled demeanor at trial and discount any testimony that he lacked substantial capacity to appreciate the wrongfulness of his conduct at the time of the crime!

Respondent concludes by arguing about defendant's competency to stand trial. Once again, this is not the issue. The State argues that the position adopted by the Nevada Supreme Court in this case was reasonable and not violative of Petitioner's constitutional rights, yet they fail to provide any arguments demonstrating how the constitutional rights of medicated defendants are not violated.

Petitioner RIGGINS' constitutional rights were violated. For instance, the United States Supreme Court in

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Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2457, 73 L.Ed.2d 28 (1982), held that liberty from bodily restraint as well as liberty from chemical restraint, (emphasis added) has always been recognized as the core liberty protected by the Due Process Clause from arbitrary government action. This interest survives criminal conviction and incarceration.

The State also failed to note the Fifth Amendment violations that are present in a state's decision to compel one who is presenting an insanity defense, to be medicated in order to stand trial. Such medication and the altered demeanor that accompanies it compels the defendant to be the instrument of his own conviction, and by mandating this altered demeanor the State lightens its own burden at trial, violating the fundamental precept of justice that the State must shoulder the burden of proving its case against the individual.

CONCLUSION

The Due Process Clause of the Fifth and Fourteenth Amendments contain a liberty interest in the right to privacy, including the right to make one's own decisions about fundamental matters, the right to personal dignity, bodily integrity, and the right to communicate ideas freely. The decision whether to accept treatment with antipsychotic drugs is of sufficient importance to fall within the category of privacy interests protected by the Constitution.

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DAVID RIGGINS was refused this right to make decisions regarding his body, when his request that the administration of medication be discontinued was denied. The trial court allowed Petitioner RIGGINS to be drugged into zombie-like competency against his will, thereby depriving him a "full and fair" trial. This Court should grant the Petition for Writ of Certiorari and reverse the court below, remand this case to the trial court and order a new trial of DAVID RIGGINS in an unmedicated state.

DATED this 31 day of July, 1991.

Respectfully Submitted,

MACE J. YAMPOLSKY, ESQ.
Nevada Bar No. 001945
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(702) 384-5563
Attorney for Petitioner

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NO. 90-8466

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

* * * * * *

DAVID E. RIGGINS,

Petitioner/Appellant,

vs.

STATE OF NEVADA,

Respondents.

Nevada Supreme Court
No. 19873

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies and affirms that I am an employee of the law office of MACE J. YAMPOLSKY, ESQ., Attorney for Petitioner in the above-entitled matter, and am a person of such age and discrimination to be competent to serve papers.

That on July 31, 1991, I served a copy of the foregoing REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI enclosed in an envelope with postage fully prepaid thereon addressed to the following:

Attorney General's Office
State of Nevada
Capitol Complex
Heroes Memorial Building
Carson City, Nevada 89710

Rex Bell, Dist. Atty.
Clark County Dist. Atty.
200 S. 3rd St., 7th Floor
Las Vegas, Nevada 89155

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)

Solicitor General
Department of Justice
Washington, D.C. 20530

David E. Riggins
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Clerk of the Court
Supreme Court of the State of Nevada
Supreme Court Building
Capitol Complex
Carson City, Nevada 89710

Supreme Court of the United States
Office of the Clerk
One, 1st Street N.E.
Washington, D.C. 20543

Suzanne Swank
Employee of MACE J. YAMPOLSKY, ESQ.

No. 90-8466

In The

Supreme Court of the United States

October Term, 1991

DAVID E. RIGGINS,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Nevada

JOINT APPENDIX

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Attorneys for Petitioner

*Counsel of Record

Petition For Certiorari Filed June 13, 1991
Certiorari Granted October 7, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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Chronology of Events

November 21, 1987:	Petitioner arrested
December 1, 1987:	Initial arraignment
January 13, 1988:	Motion to suspend trial until competence is determined
January 20, 1988:	Order of Nevada District Court, Clark County, appointing psychiatrists to determine competency
March 2, 1988:	Order of Nevada District Court, Clark County appointing psychiatrist William D. O'Gorman, M.D., to determine competency
March 18, 1988:	Order declaring petitioner legally sane and competent to stand trial
March 25, 1988:	Preliminary Hearing in the Justice Court of Las Vegas Township, Clark County, Nevada
April 5, 1988:	Information filed charging petitioner with robbery with use of a deadly weapon and murder with use of a deadly weapon
June 10, 1988:	Motion to terminate administration of medication
June 10, 1988:	Notice of insanity defense filed
July 14, 1988:	Hearing on motion to terminate medication

July 28, 1988:	Order denying Petitioner's motion to terminate administration of medication
November 7-15, 1988:	Guilt/Innocence Phase of Trial
November 15, 1988:	Jury verdict finding petitioner guilty of Robbery with use of a Deadly Weapon (Count I) and First Degree Murder with Use of a Deadly Weapon (Count II)
November 16-17, 1988:	Penalty Phase of Trial
November 17, 1988:	Jury verdict imposing a sentence of death upon petitioner
December 28, 1988:	Judgment of conviction and death filed
December 28, 1988:	Notice of appeal to Supreme Court of Nevada filed
March 28, 1991:	Opinion of Supreme Court of Nevada affirming petitioner's death sentence and underlying convictions
April 15, 1991:	Order of Supreme Court of Nevada staying remittee pending the filing of a petition for writ of certiorari

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Psychiatric Report of David Riggins by Rajendra Patel, M.D., January 24, 1987

ADMITTING DIAGNOSIS:

Axis I ..... Paranoid schizophrenia
Axis II ..... None
Axis III ..... None
Axis IV ..... Moderate
Axis V ..... Poor.

REASON FOR ADMISSION:

Mr. Riggins is a thirty year old caucasian male who was admitted on a 5150 from his home because patient was very delusional. He was wandering on the streets in his underwear at 2 o'clock in the morning. Was stating that his father is J.F.K. and his mother is Marilyn Monroe. He was also feeling that the Mafia is after him because he owns stocks in I.B.M. Patient has been hospitalized in the past but no other information was available.

SIGNIFICANT FINDINGS:

At the time of admission, patient was poorly kempt. His stream of talk was coherent but his content showed a lot of delusional thinking. Mood was depressed. Affect was flat. He said that he hears voices of the God and Devil and also from St. Peter. He seems of average intelligence. There were no memory deficits. He denied any suicidal thoughts.

INITIAL IMPRESSION:

Axis I ..... Paranoid schizophrenia.

HOSPITAL COURSE:

The patient was admitted to I.C.U. He was closely observed. He required restraints initially because he was very agitated. Patient was put on Haldol 5 mgs. IM q 4 hrs PRN for agitation.

Initial laboratory workup showed a W.B.C. of 6.6, hemoglobin of 15.7, hematocrit of 46, MC was 92, differential was essentially unremarkable. Glucose was 87, BUN was 12, Creatinine 1, LDH 228, SGOT 17, SGPT 22. All of the results were unremarkable.

Physical examination showed no acute medical problems.

Patient continued to be delusional and paranoid, he was put on a 14 day Hold. On Haldol the patient improved somewhat, his delusional thinking was somewhat better and there were no hallucinations. He accepted to sign voluntary admission and he was transferred to the Open Unit. On the following day the patient went out of the hospital and did not return. He was not suicidal or homicidal at the time of discharge. Patient was discharged A.M.A. on 1-22-87 from AWOL status.

DISCHARGE SUMMARY

CONDITION AT THE TIME OF DISCHARGE:

Patient is still delusional, but not suicidal and not homocidal. He was able to take care of his personal

needs. Patient, at the time of his discharge, was not holdable.

DISCHARGE MEDICATIONS:

Medications at the time of discharge – none.

RECOMMENDATIONS FOR AFTERCARE:

Patient was discharged A.M.A. so no arrangements could have been made. He will followed [sic] in the office if he makes a contact.

FINAL DIAGNOSIS:

Axis I..... Paranoid schizophrenia.
Axis II ..... None
Axis III ..... None
Axis IV ..... Moderate.
Axis V ..... Poor.

RP/sl
d:1-22-87
t:1-24-87

/s/ _____
RAJENDRA PATEL, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. DAVID EDWARD RIGGINS, Defendant.	)	CASE NO. CE1906 (Filed January 13, 1989)

MOTION TO SUSPEND TRIAL UNTIL DEFENDANT'S COMPETENCE IS DETERMINED; REQUEST FOR REINSTATEMENT OF BAIL

DATE OF HEARING: January 20, 1988
TIME OF HEARING: 9:00 A.M.

COMES NOW the Defendant, DAVID EDWARD RIGGINS, by and through his undersigned counsel, MAC J. YAMPOLSKY, ESQ., and respectfully moves this Honorable Court to suspend the trial of this case until the question of the Defendant's competence is determined and to reinstate bail.

This Motion is made and based upon the attached Memorandum of Points and Authorities.

Respectfully submitted:

By: /s/ Mace J. Yampolsky
MACE J. YAMPOLSKY, ESQ.
Attorney for Defendant

District Court, Clark County, Nevada (caption, etc.)

Psychiatric Evaluation Report by Franklin D. Master, M.D.

February 8, 1988

Mace J. Yampolsky, Attorney-at-Law
520 South Fourth Street
Las Vegas, Nevada 89101-6593

RE: David E. Riggins

Dear Mr. Yampolsky:

I interviewed your client, a 31-year-old Caucasian male, at the Clark County Jail February 7, 1988. I also carefully reviewed the discovery sheets that you had provided me.

Prior to interviewing the defendant, I assured him that you would be the only individual receiving my report; therefore, what we discussed would be of a confidential, privileged nature as this was our own relationship with him.

The defendant indicates that he knows the charge against him and the possibile [sic] penalties should he be found guilty. He tells me he had purchased cocaine in the past from his allege victim.

The defendant has resided in Las Vegas for 11 years. He was born in West Covina, California but was reared in South Pasadena, California. He dropped out of school when he was in his senior year at age 18. He denies juvenile arrests. He states he had to repeat the first grade and that he was in a learning disability class. He admits to prior arrests for traffic citations and one assault charge

against a homosexual. He states that case was later dismissed. He states that prior to his arrest he was employed both at the Silver Dragon Restaurant as a busboy and at Terrible Herbst as a cashier. He rents a room from a male roommate (non-homosexual relationship, according to the defendant). He states that he first used marijuana at age 13, that he used LSD at age 18, and that he has been injecting cocaine for the past 1½ years. He stated that on the night in question, he had used cocaine as recently as an hour before the killing. He readily admits to good memory of the events that occurred.

The defendant states that he killed his victim in self-defense as the victim was trying to kill him with a knife, and that he (the defendant) took the knife away from the alleged victim and stabbed him in the heart. He states that it was all justifiable homocide, although he states that he is sorry now that he killed this individual. He gives conflicting stories as he describes the event, at one point stating the individual was still alive, verbally forgave him and did not want him to send for an ambulance or get any help as he was glad to be dying; then he later changes his story to state that the victim was already dead when he left, that he had only stabbed him 12 times and he really does not believe he stabbed him 32 times. He also gave conflicting stories in that he states his alleged victim had AIDS and was due to die anyway and that he, the defendant, hates queers because he was raped himself at age 18 by a black male homosexual. Then he changed his story to state that he knows the alleged victim was not homosexual since he and the alleged victim had both dated the same girlfriend in the past.

The defendant was extremely evasive when I asked why he had to stab the alleged victim so many times, adding that "it was all justifiable homocide" and that he was merely acting out of self-defense.

On mental status examination, this is a thin Caucasian male with a trim black beard and glasses. I found him calm and coherent. I felt that he was carefully weighing the interviewer throughout the interview in a rational fashion to see the interviewer's reactions. I also felt he was guarded and evasive on furnishing any information which might be detrimental to his own case.

The defendant also states that he is currently taking 450 mg a day of Mellaril, that he has been using Mellaril for six years, that he used it in 1979 from Dr. D'Gorman here In Las Vegas and that he also has seen a Dr. Lutkey in Rosemead, California, and a Dr. White In Albambra, California.

Despite the fact that the defendant states he is on medication, I feel the defendant meets all criteria for competency to assist the defense counsel and that, at the time of the alleged offense, the defendant knew right from wrong. His behavior both at the time of the arrest and the fact that he had taken articles with him and fled the scene of the crime indicates that at the time of the alleged offense he was aware that what he did was wrong. If, indeed, the defendant's story of being on cocaine at that time could be verified, possibly his being intoxicated with cocaine and if, indeed, there was a fight as he described, then these events might possibly be mitigating circumstances.

As stated, I found the defendant to be using what I felt was some duplicity despite my assurance to him that the

interview would be confidential. I feel that the defendant is competent and at the time of the alleged event qualified for being legally sane.

Sincerely,

/s/ Franklin D. Master
Franklin D. Master, M.D.

District Court, Clark County, Nevada (Caption omitted, etc.)

Psychiatric Evaluation by Jacy A. Jurasky, M.D.

February 9, 1988

Mace J. Yampolsky, Esq.
520 So. Fourth St.
Las Vegas, NV. 89101

Re: Psychiatric Evaluation of: David E. Riggins
Case #: C 81906

Dear Sir(s):

David E. Riggins, 31, was interviewed on February 9, 1988 at the CCDC where he is being held accused of Robbery and Murder, both WUDW. I am in possession of copies of the discovery. This evaluation was requested because counsel believes the responses of his client have at times appeared bizarre and not responsive.

Riggins, a bespectacled man of average height and appearance was outwardly cooperative and responsive during our examination but he manifested numerous signs indicating severe mental illness. He told me he came from California 13 years ago and has lived here since. He works in many differing but menial capacities, is unmarried, has never been in the military, and dropped out before completing high school.

In the same flattened affect and monotone he told me his father had him committed in a California mental hospital two years ago but gave no reason for it. "They threw me out when they found out I couldn't pay for it." He went on to say, "I murdered Wade because he had killed to [sic] little girls. One in California and one here.

That's in the records. It was justifiable because I have no feelings about it."

Many of Riggins' sentences had the same rigidity, unemotional, sometimes disconnected, quality of withdrawal usually associated with chronic and severe schizophrenia. He told me he hears voices all the time, sometimes friendly, sometimes not. He identified the voices as belonging to a David O'Reilly and a John Holmes. He was unable to subtract 7's serially. He lacks insight. Judgment is considered psychotic.

I believe this defendant is suffering from a mental illness of psychotic proportions with delusions of a paranoic nature, ideas of reference, auditory hallucinations, and a rigid and inappropriate affect. As such I find him incompetent to advise reliably with counsel, aid in his own defense, recall evidence, or give testimony if called upon to do so. I would suggest he be transferred to a mental hospital for further diagnosis and treatment. He must be considered potentially dangerous to himself and others.

Sincerely,

/s/ Jack A. Jurasky
Jack A. Jurasky, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

(Caption omitted in printing)

ORDER
SANE AND REMAND

DATE OF HEARING MARCH 9, 1987

TIME OF HEARING 9:00 A.M.

THE MATTER having come on for hearing on the 9th day of March, 1988, for the purpose of consideration of psychiatric examination of defendant; the defendant being present with his counsel, MACE YAMPOLSKY; the plaintiff being represented by REX BELL, District Attorney, through BILL A. BERRETT, Deputy; and the Court having considered the reports of Dr. William D. O'Gorman and Dr. Franklin D. Master, both licensed and practicing psychiatrists in the State of Nevada, said reports setting forth the results of their examinations of said defendant having previously been filed herein, the court finds the defendant, DAVID EDWARD RIGGINS, to be in possession of sufficient mental faculties to aid and assist counsel in his defense;

WHEREFORE, upon good cause showing:

IT IS HEREBY ORDERED that the defendant, DAVID EDWARD RIGGINS, be, and he is hereby, declared legally sane and competent to stand trial.

IT IS FURTHER ORDERED that this matter shall be, and it is hereby, remanded to the Justice Court of Las Vegas Township for further proceedings.

DATED this 18th day of MARCH, 1988.

/s/ Illegible
DISTRICT JUDGE

/s/ Bill A. Berrett
BILL A. BERRETT
Deputy District Attorney

DISTRICT COURT

CLARK COUNTY, NEVADA

(Caption omitted in printing)

Illegible
CLERK

CASE NO. C81906

DEPT. NO. II

(Filed April 5, 1988)

INFORMATION

ROBBERY WITH USE OF A DEADLY WEAPON (Felony NRS 200.380, 193.165) and MURDER WITH USE OF A DEADLY WEAPON (Felony NRS 200.010, 200.030, 193.165)

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

REX BELL, District Attorney within and for the County of Clark, State of Nevada, in the name and by the authority of the State of Nevada informs the Court

That DAVID EDWARD RIGGINS the Defendant ___ above named, on or about the 20th day of NOVEMBER, 1987, at and within the County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such cases made and provided, and against the peace and dignity of the State of Nevada, did

COUNT I - ROBBERY WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, and feloniously take personal property including, but not limited

to, lawful money of the United States; men's coat; two (2) prescription vials in the name of PAUL WILLIAM WADE; one (1) set of car keys; and one (1) apartment key, from the person of PAUL WILLIAM WADE, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of the said PAUL WILLIAM WADE, said defendant using a deadly weapon to-wit: a knife, during the commission of said crime.

COUNT II - MURDER WITH USE OF A DEADLY WEAPON

did then and there, without authority of law and with malice aforethought, wilfully and feloniously kill PAUL WILLIAM WADE, a human being, by stabbing at and into the body of the said PAUL WILLIAM WADE with a deadly weapon, to-wit: a knife.

REX BELL
DISTRICT ATTORNEY

BY /s/ Bill A. Berrett
BILL A. BERRETT
Deputy District Attorney

Names of Witnesses known to the District Attorney's Office at the time of filing the information are as follows:

AUSTIN, MARK
725 Sierra Vista
Las Vegas, Nv 89109

AUSTIN, THOMAS
3620 Lost Hills Dr.
Las Vegas, Nv 89122

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BEZIAH, PATRICIA
2008 Monterey
Las Vegas, Nv 89104

CAMPBELL, MICHAEL K
LVMPD BADGE# :3080

CANTALAMESSA, LIYDA
2665 S Bruce
Las Vegas, Nv 89109

CASSELL, BILL
LVMPD BADGE# :3077

EDWARDS, KYLE LEE
LVMPD BADGE# :1005

FRANKS, PATRICK
LVMPD BADGE# :1345

GOOD, KAREN CHARLECE
LVMPD BADGE# :278

GOOD, RICHARD G
LVMPD BADGE# :806

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Las Vegas, Nv 89106

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LEAVITT, ALRED B
LVMPD BADGE# :189

MAGEE, SHANE R
Inmate - CCJ
Las Vegas, Nv

MUMPOWER, FRED PATRICK
LVMPD BADGE# :372

NORMAN SHEREE L
LVMPD BADGE# :3110

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REES, ROBERT
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REYES, DAVID
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Las Vegas, Nv 89104

RODERICK, ROBERT G
LVMPD BADGE# :211

WILLIAMS, KENNETH
Inmate - CCJ
Las Vegas, Nv

MOSER, M.E.
LVMPD BADGE# :1224

HALL, L.
LVMPD BADGE# :2549

SHEETS, J.
LVMPD BADGE# :697

GROOVER, K.
LVMPD BADGE# :904

FILLER, EDIE
2665 S. BRUCE# :279
Las Vegas, Nv

SIEFKER, N.
LVMPD BADGE# :3057

District Court, Clark County, Nevada

(Caption Omitted In Printing)

Psychiatric Evaluation by Jack A. Jurasky, M.D.

June 8, 1988

Mace J. Yampolsky, Esq.
520 So. Fourth St.
Las Vegas, NV, 89101

Re: Psychiatric Evaluation of: David E. Riggins
Case #: C 81906

Dear Sir(s):

David E. Riggins, 31, was seen for the second time on June 6, 1988 for a re-evaluation as requested by counsel. He was, in many respects, similar to the way he appeared during our first interview on February, 1988. He acknowledged me as well as the reasons for his being in jail and appeared to be well oriented to time, place, person, activity, and purpose. His memory functions also seemed intact.

As in February he was outwardly cooperative and responsive to my questions. However as we talked he acknowledged being actively hallucinatory hearing voices "from hell, these are evil spirits telling me to kill myself or someone else that I have to tell to be quiet. There are two evil spirits, one is Satan and the other is his assistant."

Riggins told me about his childhood and of how he and his siblings were abused by his father and stepmother. He also has epilepsy and has had seizures "for as long as I can remember." At present he is taking rather

large doses of Mellaril daily. Mellaril is a powerful antipsychotic drug which appears to be controlling the defendant without curing him. He is also being medicated with Dilantin for his seizures.

Riggins appears superficially competent to advise with counsel, give testimony, recall evidence, and to aid in his defense. However, I believe that he is actively psychotic, severely paranoid, and very dangerous to himself and others. He changes his story in many places but not to his defense or in any way offering an alibi. I don't think he realizes what he is saying and is not aware of contradictions. If taken off medication he would most likely regress to a manifest psychosis and become extremely difficult to manage. He was not taking medications of any type when he committed the homicide. Consequently I think he is not truly competent to assist in his defense. I am also of the opinion that on the day of the alleged offense of murder, he was not in possession of mental faculties sufficient to know right from wrong or to know he was doing a wrongful act. He was acting in a manner "to keep him (the victim) from killing more girls, and to protect myself . . . it was self-defense."

Sincerely,

/s/ Jack A. Jurasky, M.D.
Jack A. Jurasky, M.D.

DISTRICT COURT

CLARK COUNTY, NEVADA

(Caption Omitted In Printing)

MOTION TO TERMINATE ADMINISTRATION OF MEDICATION

COMES NOW, the Citizen Accused, DAVID EDWARD RIGGINS, by and through his attorney, MACE J. YAMPOLSKY, ESQ., and respectfully moves this Court pursuant to the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 8, of the Nevada Constitution, for an order terminating the State's administration of Mellaril, a mind altering drug, and Dilantin to the accused prior to and during his Trial on June 27, 1988.

This Motion is made and based upon the Points and Authorities attached hereto as well as the entire file on record with the Court.

DATED this 10 day of June, 1988.

By /s/ Mace J. Yampolsky
MACE J. YAMPOLSKY
Las Vegas, NV. 89101-6593
Attorney for Defendant

NOTICE OF MOTION

TO: REX BELL, CLARK COUNTY DISTRICT ATTORNEY:

TO: BILL A. BERRETT, DEPUTY DISTRICT ATTORNEY:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing Motion on for hearing before the

above entitled Court on the 20 day of June, 1988, at the hour of 9 AM., or as soon thereafter as council can be heard, in District Court, Department II.

DATED this 10 day of June, 1988.

By /s/ Mace J. Yampolsky
MACE J. YAMPOLSKY
520 So. 4th St.
Las Vegas, NV. 89101-6593
Attorney for Defendant

POINTS AND AUTHORITIES

I. THE STATE'S ADMINISTRATION OF THE ANTIPSYCHOTIC, MELLARIL, AND DILANTIN INVOLUNTARILY TO A DEFENDANT VIOLATES THAT DEFENDANT'S RIGHT TO PRESENT A FULL AND FAIR DEFENSE ON HIS OWN BEHALF.

Freedom of thought and speech is the matrix, the indispensable condition of nearly every other form of freedom. *Palko v. Connecticut*, 302 U.S. 319, 326, 58 S. Ct. 149, 82 L.Ed. 288 (1937). The state's administration of mind altering drugs directly affects this freedom and is in direct conflict with due process of law. *State v. Maryott*, 6 Wash. App. 96,492 P.2d 239, 240 (1971).

Article 1 Section 8 of the Nevada Constitution affords an accused the right to establish any fact relevant to the protection of his property or liberty, *Wright v. Cradlebaugh*, 3 Nev. 341 (1867), *State v. Fouquette*, 65 Nev. 505, 221 P.2d 404 (1950) *cert. denied*, 341 U.S. 932, 71 S. Ct. 799, 95 L.Ed.2d 1361 (1951). The defendant's apparent mental capacity at the time of trial should not be under the control of his adversary.

Moreover, courts have held that the Fourteenth Amendment to the U.S. Constitution protects an individual from having his mental capacity altered by the State at the time of trial. *State v. Maryott*, 6 Wash. App. 96, 99, 492 P.2d 239, 242 (1971), *In Re Prey*, 133 Vt. 284, 336 A.2d 174, 177.

Our legal system is an adversary process. However, the *Maryott* court noted that "[w]hen the state is allowed, during the time of trial, to administer drugs to a defendant, contrary to his will, it is able to affect the judgment and capacity of its own adversary". *Maryott*, at 241.

When mental competence is at issue, the right to offer testimony involves more than mere verbalization. *Id.* at 242. The demeanor in court of one who has raised the issue of his sanity is of probative value to the trier of fact. *United States v. Chandler*, 72 F. Supp. 230 (D.C. Mass. 1947). Furthermore, due process of law mandates that a jury, called to determine the issue of a defendant's sanity, be exposed to the true mental state of the defendant.

A court confronted with such a violation of due process stated;

> "[T]he jury never looked upon an unaltered, undrugged Gary Prey at any time during the trial. Yet his deportment, demeanor, and day-to-day behavior during that trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justifiability of his defense of insanity" *In Re Prey*, 133 Vt. 284, 336 A.2d 174, 176 (1975).

The court went on to note that, "[i]n fact it may well have been necessary, in view of the critical nature of the

issue, to expose the jury to the undrugged, unsedated Gary Prey." *Id.* at 177.

Furthermore, the Nevada Supreme Court has held that a defendant who has been adjudged competent to stand trial cannot be compelled to take medication prior to and during trial notwithstanding the district court's order. *Ford v. District Court*, 97 Nev. 578, 579, 635 P.2d 578 (1981).

II. THE COMPETING STATE INTEREST OF CONDUCTING A SAFE AND ORDERLY TRIAL DOES NOT OVERRIDE DAVID EDWARD RIGGINS RIGHT TO A FAIR TRIAL.

The United States Supreme Court has held that a defendant's fundamental Sixth Amendment right to be present may be limited or lost when his conduct made an orderly trial impossible and that after a defendant has been guilty of outrageous conduct in court, he may be cited for contempt, bound and gagged, or removed from the courtroom depending on which is the fairer, more reasonable way. *Illinois v. Allen*, 397 U.S. 337, 347, 90 S. Ct. 1057, 1063, 25 L.Ed. 353 (1970).

One Court denied a defendants due process argument on appeal proffering two basic reasons. First, the court argued Thorazine, a drug which suppresses emotional brain activity, was not mind altering, Second, the court noted that although there was a due process issue it was mute because the defendant was given ample opportunity to tell the jury that he was being given Thorazine and he declined to do so. *State v. Jojola*, 89 N.M. 489, 493, 553 P.2d 1296, 1299 (19**).

The case at bar can be readily distinguished from *Jojola*. First, the drug in question is not Thorazine. Mellaril is a mind altering drug which acts on the patient "through its inhibitory effect on psychomotor functions". *Physician's Desk Reference*, 36th ed. 1982, p. 1681. Second, in this case the due process issue is being brought before this Court prior to trial, not on appeal.

Also, the guidelines of *Allen*, requires that a need to control be demonstrated at trial before it is imposed. DAVID ALLEN RIGGINS has done nothing to indicate that his presence, unfettered by Mellaril will in any interfere with the State of Nevada's legitimate interest in an orderly trial.

CONCLUSION

Based on the preceding Points and Authorities the Defendant moves this Court to allow him to appear at his trial without being under the influence of drugs in order to insure his right to a fair trial.

Respectfully submitted,

/s/ Mace J. Yampolsky
MACE J. YAMPOLSKY
Las Vegas, NV. 89101-6593
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

(Caption Omitted In Printing)

NOTICE OF INSANITY DEFENSE

TO: REX BELL, CLARK COUNTY DISTRICT ATTORNEY

TO: BILL A. BERRETT, DEPUTY DISTRICT ATTORNEY

DAVID E. RIGGINS, by and through his undersigned counsel, MACE J. YAMPOLSKY, ESQ., does hereby give notice that he does intend to rely upon the affirmative defense of insanity in that, on the date and at the time of the commission of the offense, the defendant was insane and did not know the nature and quality of his act.

Submitted this 10 day of June, 1988.

/s/ Mace J. Yampolsky
MACE J. YAMPOLSKY
520 So. 4th St.
Las Vegas, NV. 89101-6593
Attorney for Defendant

DISTRICT COURT

CLARK COUNTY, NEVADA

(Caption Omitted In Printing)

CASE NO. C81906

DEPT. NO. II

OPPOSITION TO MOTION TO TERMINATE MEDICATION REQUIRED TO MAINTAIN LEGAL COMPETENCY; STATE'S MOTION TO HAVE THE DEFENDANT EXAMINED BY TWO PSYCHIATRISTS IN ORDER TO DETERMINE SANITY

DATE OF HEARING:7-14-88
TIME OF HEARING: 9:00 A.M.

COMES NOW, the STATE OF NEVADA, through REX BELL, District Attorney, by and through BILL A. BERRETT, Deputy District Attorney, and files this Opposition to Motion to Terminate Medication Required to Maintain Legal Competency; State's Motion to Have the Defendant Examined by Two Psychiatrists in Order to Determine Sanity.

Said Response is made and based upon all the files, papers and pleadings on file herein, Points and Authorities in support hereof, as well as arguments of counsel, if deemed necessary by this Court.

DATED this 28th day of June, 1988.

REX BELL
DISTRICT ATTORNEY

BY: /s/ Bill A. Berrett
BILL A. BERRETT
Deputy District Attorney

ARGUMENT

I

THE M'NAGHTEN RULE CONTINUES TO BE THE LAW CONCERNING SANITY IN NEVADA.

NRS 193.190 provides:

> "In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence."

NRS 193.200 provides:

> "Intention is manifested by the circumstances connected with the perpetration of the offense, and the *sound mind* and discretion of the person accused." (emphasis added).

NRS 193.210 provides:

> "A person shall be considered of sound mind who is neither an idiot nor lunatic, nor affected with insanity, and who has arrived at the age of 14 years, or before that age, if such person knew the distinction between good and evil."

In Nevada in 1889, in the case of *State of Lewis*, 20 Nev. 333 (1889), the Supreme Court approved and adopted the "right and wrong" test patterned after the English M'Naghten rules pronounced by English judges in 1843. The *Lewis* court stated the following as cited in *Sollars v. State*, 73 Nev. 248, 250 (1957):

> "To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act that he was doing, or, if he did know it

that he did not know he was doing what was wrong."

In *Williams v. State*, 85 Nev. 169 (1969), the Nevada Supreme Court again held that the M'Naghten case is the rule of criminal responsibility in Nevada. The *Williams* court further cited the law as set forth in *State v. Lewis*, supra. In *Williams*, at p. 173, the court noted:

> "[I]f a man has capacity and reason sufficient to enable him to distinguish right from wrong as to the particular act in question, and has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, he is, in the eye of the law, of *sound mind and memory*, and should be held criminally responsible for his acts . . . " (emphasis added).

The M'Naghten rule continues to be the accepted standard in Nevada for determination of mental sanity. *Poole v. State*, 97 Nev. 175 (1981); *Clark v. State*, 95 Nev. 24 (1979).

"Insanity is an affirmative defense which the accused, who is presumed sane, must prove by a preponderance of the evidence." *Ybarra v. State*, 100 Nev. 167, 172 (1984). Sanity is not an element of the offense which the prosecutor must plead and prove. *Id.* at p. 172; *Clark v. State*, 95 Nev. 24, 28 (1979).

This history, concerning the M'Naghten standard, is pertinent in the following discussion because the Nevada insanity standard patterned after M'Naghten is not as liberal as those jurisdictions which have accepted other insanity standards. When discussing forced medication during insanity defense cases it is critical to understand the appropriate legal standard one is referring to. For

example, in *Commonwealth v. Louraine*, 453 N.E.2d 437 (Mass. 1983), the Massachusetts Supreme Judicial Court noted that the Massachusetts insanity standard is "much broader [than the M'Naghten test] and relieves the defendant of criminal responsibility if, at the time of the conduct, as a result of mental disease or defect, he lacked substantial capacity to conform his conduct to the requirements of the law." They further noted that the demeanor of the defendant is "more relevant" to their broader insanity concept. Therefore, in Massachusetts they view the defendant's demeanor in court as much more sacred under an insanity defense than jurisdictions which follow the M'Naghten rule. Thus, jurisdictions which do not follow the M'Naghten rule should be carefully examined in the following context.

II

THE DEFENSE MOTION TO ORDER THE TERMINATION OF MEDICATION SHOULD BE DENIED

The defense seeks to have this court order the termination of medication to the defendant prior to and during his trial. The defense indicates that the defendant is presently being administered the drugs Mellaril and Dilantin. He alleges, without affidavit, that these drugs are being administered to the defendant, apparently against his will.

Initially, it should be noted that on January 4, 1988, the defendant was held to answer in District Court conditionally in order that he could be examined as to his sanity by psychiatrists. On March 9, 1988, after being examined by three psychiatrists, the defendant was found

competent to stand trial. The psychiatric reports which are in possession of the State are attached hereto as an Exhibit and are incorporated herein by this reference. These reports include a January 15, 1987, report from Dr. R. Patel of Alhambra, California; a February 8, 1988 report of Dr. Franklin Master; a February 9, 1988, report of Dr. Jurasky; and a second report of Dr. Jurasky dated June 8, 1988. The State is under the belief that another report exists which is not yet in our possession – that report being from Dr. O'Gorman. This report was used to determine the defendant's competence on March 9, 1988.

The report of Dr. Patel in Alhambra, California, indicates that the defendant was diagnosed as suffering from paranoid schizophrenia and was treated while hospitalized with Haldol for hallucinations.

Dr. Master's February 8, 1988, report indicates that the defendant claimed the killing was justifiable. He even expressed sorrow for the killing. The defendant told Dr. Master that he was taking 450 mg. a day of Mellaril and had been using it for six (6) years. He reported seeing Dr. O'Gorman here in Las Vegas as well as Dr. Lutkey in Rosemead, California and a Dr. White in Alhambra, California. He concluded that the defendant knew right from wrong at the time of the crime.

Dr. Jurasky found the defendant incompetent to stand trial because he suffered from psychotic mental illness. This first report was from a February 9, 1988, interview.

On June 6, 1988, Dr. Jurasky again interviewed the defendant. This interview is reported in the June 8, 1988 report. Dr. Jurasky reports the defendant was taking large

doses of Mellaril daily which is a powerful anti-psychotic drug which appeared to control the defendant. The defendant was also taking Dilantin for seizures. Dr. Jurasky stated that if taken off the medication, the defendant would likely regress to a manifest psychosis.

As the State does not at present have the report of Dr. O'Gorman, we will need to wait until the scheduled evidentiary hearing in order to present his medical opinion.

NRS 178.400 provides:

> "1. A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent.
>
> 2. For the purposes of this section, "incompetent" means that the person is not of sufficient mentality to be able to understand the nature of the criminal charges against him, and because of that insufficiency, is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter."

NRS 178.405 provides:

> "When an indictment or information is called for trial, or upon conviction the defendant is brought up for judgment, if doubt arises as to the competence of the defendant, the court shall suspend the trial of the indictment or information or the pronouncing of the judgment, as the case may be, until the question of competence is determined."

Doubt as to the sanity of a defendant means doubt in the mind of the trial court rather than counsel or others. It

lies in the discretion of the trial judge. *Williams v. State*, 85 Nev. 169, 174 (1969); *Hollander v. State*, 82 Nev. 345 (1966).

"A conviction of an accused while legally incompetent violates dues [sic] process and must be set aside." *Miller v. State*, 89 Nev. 561, 563 (1973); *Krause v. Fogliani*, 82 Nev. 459 (1966). Since it is critical for due process and statutory requirements to only try and convict competent defendants, it is essential that all parties involved take steps to assure that the defendant is now competent and that he will remain competent throughout the trial period.

Viewing the facts as thus far presented, it is clear that in order for the defendant to remain in such a condition that he can assist counsel at trial he must continue to receive proper medication. Since the defendant must be competent to stand trial a defendant might theoretically postpose [sic] indefinitely his trial on the merits if he were to be permitted to legally refuse the medication which is deemed essential for him in order for him to maintain his competence.

While this issue has not been closely analyzed in Nevada, many jurisdictions have discussed this exact issue in depth. This issue has been referred to as "chemical competence," or "synthetic sanity". Briefly stated that issue is: Does the state have the right to compel a defendant, over objection, to take drugs which affect his mental or physical ability at trial when the defendant's mental ability to commit the crime charged is at issue?

A secondary issue examines the purpose for which the medication is administered. Is the medication given in order to control the defendant's behavior in court, or is it

to enable the accused to maintain his competency to stand trial?

A third issue surfaces: Can an accused who must receive medication in order to maintain his competence waive his right to not be tried while incompetent? Other issues come into discussion also. What was the medical condition of the "Synthetically sane" defendant at the time of the criminal offense? Was the accused on medication when the offense occurred? Is the jury permitted to see the defendant in the same medical state as he appeared at the time of the offense as a matter of due process? And finally, what solutions or remedies are available in the stated situations?

First, can the State compel an accused over his objection to take medication when he would be legally incompetent without that medication when the mental state (insanity) of the accused is at issue? The cases which have dealt with this issue discuss a number of tranquilizing and anti-psychotic drugs including: Haldol, Thorazine, Stelazine, Lithium, Valium, Sparine, Librium, Chloral Hydrate, Loxatain, Mellaril and Aventyl.

The weight of authority suggests that the issue of medications in order to assure mental and legal competency is permissible. In some cases certain safeguards are suggested. In *State v. Jojola*, 553 P.2d 1296 (N.M. Ct. App. 1976), the defendant was competent for trial as long as he was medicated with Thorazine. The facts state:

> "Defendant testified that he did not wish to go to trial while using Thorazine. His request was denied. He claims the trial court violated his right to due process of law in not permitting

> defendant to be tried when he was not under the influence of Thorazine. This due process claim has two parts: (1) the absolute right to be tried when not being medicated with Thorazone, and (2) the right not to be so tried because his trial demeanor was relevant to this theory of defense."

Medical testimony indicated that one who was administered Thorazine was sedated emotionally more than cognitively. Thus the defendant had the ability to make decisions and communicate with others. The *Jojola* court concluded at p. 1299:

> "In the absence of evidence that defendant's thought processes or the contents of defendant's thoughts were affected by the Thorazine, we hold that defendant was not denied due process because the trial took place while he was being medicated with Thorazine."

In *State v. Law*, 244 S.E.2d 302 (S.Car. 1978), the defendant was involuntarily medicated on psychotropic medications including Haldol and Loxatain. Among other claims he alleged that because the medication affected his demeanor, his insanity defense was undermined. The court held at p. 306:

> "The consensus of the medical testimony at both the competency hearing and trial indicated that the psychotropic medications had positive effects, reversing the active state and allowing him to function in a more rational manner. While it is true the medications do affect cognitive and communicative processes, the effect is beneficial in that it enabled the appellant to effectively exercise the very rights he asserts he was denied. It is reasonable to conclude from

> the medical testimony that the medications enabled the appellant to assist counsel in an effective manner. We find nothing in the record that would justify a contrary conclusion."

The court in *State v. Law*, supra, further held at p. 307:

> "Counsel for the appellant apparently takes the position that under no circumstances can medication be administered a defendant without his consent. They contend that such would be violative of his bodily integrity. We do not feel that such an absolute right exists. *It is our view that medication may be administered without the consent of a defendant under compelling circumstances, including those where the medication is necessary to render a defendant competent to stand trial.* We are of the opinion that such necessity would constitute a compelling state interest justifying infringement upon the right to bodily integrity. However, such a practice should be sparingly used with prior notice to defense counsel." (emphasis added).

In *Ake v. State*, 663 P.2d 1 (Okl. Cr. 1983), the defendant was competent only if medicated. The court upholding the treatment held:

> "Psychopharmaceutical restoration of persons to a state of normality is not an uncommon practice in modern society. If a defendant may be rendered competent to assist in his defense through the use of medication, it is in the best interests of justice to afford him a speedy trial."

In *United States v. Hayes*, 589 F.2d 811 (5th Cir. 1979), the defendant was given large doses of Aventyl (an antidepressant) and Mellaril (an anti-psychotic drug) in order

to maintain his competence to stand trial. The court noted at p. 823:

> "Appellant Hayes argues that a finding of 'incompetence but for drug maintenance' precludes a finding of competence to stand trial. But this argument is akin to declaring comatose all those diabetics who, but for periodic insulin injections, would lapse into coma. As noted by the court-appointed psychiatrist, 'there are many people who are maintained on moderate to sometimes very large amounts of tranquilizers in order that they may have jobs and function in society'. . .
>
> Once it is determined that he is competent to stand trial, the method of achieving that competence is of minor import. This is not to imply that drug maintenance is irrelevant in determining competency. Rather, all factors relating to perception and facility are to be considered. However, once it is determined that the accused has the requisite mental capacity, his method of maintaining that capacity is significant only in the area of continued competency throughout the proceedings."

In *State v. Hayes*, 389 A.2d 1379 (N.H. 1978), the trial court transferred questions to the New Hampshire Supreme Court regarding compelling an accused to be under psychotropic medication during trial. The court held at p. 1382:

> "Our answer to the first question is that the trial court may compel the defendant to be under medication at least four weeks prior to trial if the jury is instructed about the facts relating to the defendant's use of medication and if at some time during the trial, assuming the defendant so requests the jury views him without medication for as long as he is found to have been without it at the time of the crime."

In *Mines v. Florida*, 390 S.2d 332 (Fl. 1980), the defendant was "medically competent" during trial. The court held at p. 335:

> "The fact that appellant's competency is the result of approved medical treatment and medical science does not invalidate that finding of competency. To hold as suggested by appellant's counsel would mean that an individual with a mental disorder which could be controlled by medical science could not be tried for a criminal offense regardless of his ability to comprehend the nature of the proceedings and to assist counsel in his own defense."

In *State v. Stacy*, 556 S.W.2d 552 (Cr. App. Tenn. 1977), the court found the accused "medically competent" for trial. The decision analyzed many of the existing relevant cases and noted at p. 558:

> "Psychopharmaceutical restoration to sanity for the mentally incompetent patient-defendant is a medical reality for the overwhelming majority of such individuals. The courts have recognized this advancement of science in their decisions. Although the judicial system should continue to be concerned with untoward influence of drugs upon the defendant's mental competency to stand trial, nevertheless, many courts have recognized the advances in psychiatric treatment in their decisions on present sanity. The trend in trial courts is to require the drug-influenced normalized defendant to stand trial as early as

possible even though he still requires continuing psychotropic medication to retain his mental competency to stand trial."

The *Stacy* court further noted at p. 559:

> "The soundness of our ruling can best be illustrated by a reversal of the position of the parties. That is, if the State was alleging that Stacy was incompetent to stand trial, which it would have the right to do under existing law, but Stacy insisted that he be tried on the merits and could show that he would be competent by taking tranquilizing medication, then unquestionably we would hold that he would have the right to be tried at his insistence, and it would be error not to proceed with his trial. Thus, we think the State has the same right to insist that Stacy be tried on the merits of the case so long as it can be shown that the medication administered will render him mentally competent, will not affect his health, and does not preclude him from receiving a fair trial."

The second issue is: What is the purpose for which the medication is administered? In *State v. Maryott*, 492 P.2d 239 (Wash. App. 1971), it was held improper for drugs to be administered to the defendant by the jailers for the sole purpose of controlling the defendant's behavior in court. The *Maryott* court noted, however, that there were some instances where medication of defendants may be required. Also, it should be noted that in *Maryott*, medication was not necessary to maintain the defendant's competency.

The third issue is thus stated: Can an accused who is medically treated in order to remain competent waive his

right to go to trial while competent? Can he voluntarily decide to be insane while being tried? While some jurisdictions may accept this absurd situation, Nevada by statute has made competence a jurisdictional prerequisite for trial. NRS 178.400(1) clearly states: "A person *may not* be tried, adjudged to punishment or punished for a public offense while he is incompetent." (emphasis added).

Possible solutions to some of the issues presented include allowing expert testimony concerning the effect of the various medications which the defendant has taken. If possible and/or practical the defendant could be presented before the jury in the condition as at the crime's occurrence. This is improbable here as the medical reports indicate that the defendant had recently ingested cocaine shortly before the murder. Conflicts also exist as to when the defendant started taking the Mellaril. One report indicates he had taken it for the previous six (6) years.

The defense relies upon the case of *In Re Pray*, 336 A.2d 174 (Vt. 1975). In *Pray*, a post-conviction proceeding, the defendant at trial was medically sedated. Although the defense relied upon an insanity defense, the State failed to explain the effects of the medication on the defendant's trial behavior. Since the jury had no information concerning the administration or effect of the drugs the case was reversed.

The defense also relies upon *Ford v. District Court*, 97 Nev. 578 (1981). In *Ford*, the Supreme Court simply held that the District Court exceeded its jursidiction [sic] by enforcing a prior court order covering a period when Ms. Ford was committed for treatment. The District Court

acted in excess of its authority by enforcing an order mandated while the defendant was incompetent and there was no showing that continued medication was necessary to maintain competency.

III

THE STATE MOVES THE COURT FOR AN ORDER AUTHORIZING THE EXAMINATION BY TWO PSYCHIATRISTS OF THE DEFENDANT IN ORDER TO EVALUATE HIS SANITY.

As the defendant intends to rely upon a defense of insanity, the State seeks an appropriate court order to have the defendant examined in order to properly prepare for his insanity defense.

DATED this 28th day of June, 1988.

Respectfully submitted,

REX BELL
DISTRICT ATTORNEY

BY: /s/ Bill A. Berrett
BILL A. BERRETT
Deputy District Attorney

(Acknowledgment Omitted In Printing)

DISTRICT COURT

CLARK COUNTY, NEVADA
(Filed Jul. 11 3:16 PM '68)
(Illegible)
CLERK

(Caption Omitted In Printing)

RESPONSE TO OPPOSITION TO MOTION TO TERMINATE UNCONSENTED TO ADMINISTRATION OF MEDICATION; OPPOSITION TO MOTION TO HAVE THE DEFENDANT EXAMINED BY TWO PSYCHIATRISTS IN ORDER TO DETERMINE SANITY

DATE OF HEARING: 7-14-88
TIME OF HEARING: 9:00 AM

COMES NOW, the Citizen Accused, DAVID EDWARD RIGGINS, by and through his attorney, MACE J. YAMPOLSKY, ESQ., and files this Response to Opposition to Motion to Terminate Unconsented to Administration of Medication; Opposition to Motion to Have the Defendant Examined By Two Psychiatrists in Order to Determine Sanity.

This Motion is made and based upon all the points and Authorities attached hereto, the entire file on record and any oral argument as may be presented by counsel at the scheduled hearing.

DATED this 8 day of July, 1988.

By /s/ Mace J. Yampolsky
MACE J. YAMPOLKSY, ESQ.
520 So. 4th St.
Las Vegas, NV. 89101-6593
Attorney for Defendant

I

STATEMENT OF THE CASE

The State introduces its Opposition to the Motion to Terminate Medication on the soapbox of the M'Naghten rule. It has never been the posture of the defense to undermine the propriety of that rule. M'Naghten is and has ever been the law in Nevada and the "right and wrong" test stemming from that rule is the proper one.

Nor does the Defense challenge the propriety of administering drugs to render a defendant competent to stand trial and to adequately assist in his defense. It is however, the Defendant's contention that if he is not allowed to fully present evidence to the jury pertaining to his mental condition at the time of the alleged offense *i.e.*, to permit the jury to observe him free from the effects of the powerful anti-psychotic, Mellaril, he will be denied the fundamental guarantees of due process.

II

THE DEFENDANT HAS A CONSTITUTIONALLY GUARANTEED RIGHT TO HAVE THE JURY VIEW HIM AT SOME TIME DURING THE TRIAL FREE FROM THE EFFECTS OF THE POWERFUL ANTI-PSYCHOTIC MELLARIL

Article I Section 8 of the Nevada Constitution not only mandates that a party be properly brought into court but that a defendant shall also have the opportunity when in court to establish any fact which would potentially protect himself or his property. *Wright v. Cradlebaugh*, 3 Nev. 341 (1867), *State v. Fouquette*, 65 Nev. 505,

221 P.2d 404 (1950). The Defendant's actual mental capacity is one such fact. This right is made more compelling when a defendant is relying on a defense of insanity.

Few rights are more fundamental in our jurisprudence that of an accused "to present . . . [his] version of the facts." *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). This right is guaranteed not only by the Sixth and Fourteenth Amendments to the Federal Constitution, but also by Article 1 Section 8 of the Nevada Constitution.

The Ninth Circuit Court of Appeals has held that a defendant is entitled to place before the jury any evidence which is at all probative of his mental condition. *United States v. Hartfield*, 513 F.2d 254, 259-60 (9th Cir. 1975). *See also, United States v. Ives*, 609 F.2d 930, 932-33 (9th Cir. 1980); *United States v. Brawner*, 153 U.S. App. D.C. 1, 471 F.2d 969 (D.C. Cir. (1972). Further, in Justice Blackmun's words a defense may present "all possibly relevant evidence" bearing on cognition, volition and capacity. *Pope v. United States*, 372 F.2d 710, 736 (8th Cir. 1967).

Moreover, it is an established rule that, when the defendant's sanity is at issue, the trier of fact is entitled to consider the defendant's demeanor in court. *Commonwealth v. Devereaux*, 257 Mass. 391, 395, 153 N.E. 881 (1926); *State v. Hayes*, 118 N.H. 458, 462, 389 A.2d 1379 (1978); *In Re Prey*, 133 Vt. 253, 257-58, 336 A.2d 174 (1975); *State v. Maryott*, 6 Wash. App. 96, 101, 492 P.2d 239 (1971). 4 J. Wigmore, Evidence Sec 1160 (Chadbourn rev. ed. 1972). *See, United States v. Chandler*, 72 F. Supp. 230, 238 (D. Mass. 1947). *Cf, State v. Griffin*, 99 Ariz. 43, 406 P.2d

397 (1965) (To resolve issue of insanity defense it is necessary for the jury to have the entire picture of the defendant); *People v. Wetmore*, 149 Cal. Rptr. 265, 583 P.2d 1308, (1978) (Defendant cannot constitutionally be denied the right to present probative evidence regarding criminal responsibility). *See also, Colorado v. Hendershott*, 103 S.Ct. 1232, 459 U.S. 1225, 75 L.Ed.2d 466 (1982); *People v. Wright*, 648 P.2d 665 (1982). Thus, "when mental competence is at issue, the right to offer testimony involves more that mere verbalization," *State v. Maryott, supra*, 6 Wash. App. at 101, but includes the defendant's right to offer to the jury his demeanor in a state similar to that one he was in at the time of the alleged offense.

In this case it is not possible to permit the Defendant to ingest cocaine during trial. However, this fact alone does not justify refusing to permit the defendant to be free from the effects of Mellaril. At some time during trial, to protect Defendant's rights, the jury must observe his unadulterated demeanor in the courtroom if he so requests and was not under the influence of the drug in question at time of the offense. *State v. Hayes*, 389 A.2d 1379 (N.W. 1978).

When sanity is at issue the jury are likely to assess the weight of different evidence with reference to the defendant's demeanor. Moreover, if the defendant appears calm and controlled at trial, the jury may discount testimony that the Defendant lacked, at the time of the crime, the capacity to tell right from wrong. This tendency may render also valueless the defendant's right to testify on his own behalf. *See, In Re Prey, supra.*

The State's position that the ability to present expert testimony to the jury concerning the effects of Mellaril is an adequate substitute for the "real thing" is without merit. At best, such testimony would serve only to mitigate the unfair prejucide which would accrue to the Defendant as a consequence of his controlled outward appearance. It cannot compensate for the positive value to the Defendant's case of his own demeanor in an unmedicated condition. Moreover, "[i]f the state may administer tranquilizers to a defendant who objects, the state then is, in effect, permitted to determine what the jury will see or not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury's consideration of his mental condition." *State v. Maryott, supra*, 6 Wash. App. at 102, 492 P.2d 239.

The state proffers the compelling position that pursuant to Nevada statutory law a defendant cannot be convicted while incompetent. In contrast is Defendant's position that pursuant to the Federal Constitution and the Nevada State Constitution he should not be denied his right to admit evidence relevant to his theory of defense. Courts which have faced this issue have either availed a defendant of this right or, while permitting the administration of medication in the interest of continuing competence, have given great deference to this fundamental constitutional right.

The State cites *State v. Hayes*, 389 S.2d 1379 (n.H. 1978), to support their position. The defense wholeheartedly agrees with the logic of the *Hayes* court. The court held at p. 1382:

> "[T]he trial court may compel the defendant to be under medication at least four weeks prior to trial if the jury is instructed about the facts relating to the defendant's use of medication *and if at some time during the trial, assuring the defendant so requests, the jury views him without medication of as long as he is found to have been without it at the time of the crime.*" (Emphasis added).

Defendant's Motion is not made to render himself incompetent to stand trial. It is not made to have the Defendant taken off Mellaril immediately thus posing a problem for his jailers. It is made solely for evidentiary purposes. It is made pursuant to Constitutional mandate and considerable case law.

In fact only one case cited by the state denies a defendant the right to present evidence in the manner at issue. *State v. Jojola*, 553 P.2d 1296 (n.M. Ct. App. 1976). The court held that since they were not shown any evidence that Thorazine affected defendant's thought processes or the contents of defendant's thoughts he was not denied his Due Process rights. As noted in both Defendant's Motion and State's Opposition, Mellaril is a "powerful anti-psychotic" which does in fact control in part the defendant's thought processes.

The state also proffers the position that because Nevada follows the M'Naghten rule evidence as to the Defendant's mental state should be devalued. This proposal seems almost preposterous at first blush.

If a Defendant is being held to a stricter standard then certainly his opportunity to meet this standard should not be depreciated as a matter course. Ultimately, a Defendant's right to present evidence on his own behalf

is no less sacred in a jurisdiction that adheres to the M'Naghten than in a jurisdiction following a more liberal approach. Moreover, in Nevada, the concept that a defendant has the right to freely present any evidence relevant to the protection of his person or property is constitutionally protected. *See, supra.*

The issue of the evidentiary value of a defendant's demeanor before the jury has been considered in states where M'Naghten is law. *See, Maryott v. State, supra.*

III

DEFENSE OPPOSES STATE'S MOTION TO HAVE THE DEFENDANT EXAMINED BY TWO PSYCHIATRISTS

The Defendant, at this time intends to rely on the testimony of one psychiatrist in presenting the insanity defense. The Defendant would not oppose the authorization of one psychiatrist's examination for the state.

The Defendant is an indigent. He cannot afford to have another examination without the Court's directive. In the interest of fundamental fairness and justice the Defendant contends that expert testimony should be had on an equal basis. This, if the Court feels it is appropriate to authorize two examinations by state's experts then the court should also authorize an additional psychiatrist's examination by an expert chosen by the Defense.

CONCLUSION

WHEREFORE counsel for the Defendant, MACE J. YAMPOLSKY, ESQ, requests that this Court grant his Motion to Terminate Administration of Mellaril for a

period of time during trial for evidentiary purposes and deny State's Motion to Have Defendant Examined by Two Psychiatrists To Determine Sanity.

DATED this 8 day of July, 1988.

Respectfully submitted,

/s/ Mace J. Yampolsky
MACE J. YAMPOLSKY, ESQ.
520 So. 4th St.
Las Vegas, NV. 89101-6593
Attorney for Defendant

(Acknowledgment Omitted In Printing)

District Court

CLARK COUNTY, NEVADA

(Caption Omitted In Printing)

ORDER

DATE OF HEARING 7-14-88

TIME OF HEARING 9:00 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 14th day of July 1988, the defendant being present, represented by MACE YAMPOLSKY, the plaintiff being represented by REX BELL, District Attorney, through BILL A. BERRETT, Deputy District Attorney, and the matter having been submitted by the parties and taken under advisement by the Court,

IT IS HEREBY ORDERED that defendant's motion to Terminate Medication Required to Maintain Legal Competency shall be, and it is, denied.

DATED this 28 day of July, 1988.

/s/ Jack L. (illegible)
DISTRICT JUDGE

/s/ Bill A. Berrett
BILL A. BERRET
Deputy District Attorney

DISTRICT COURT

CLARK COUNTY, NEVADA

Case No. C81906 Dept. No. II

(Caption Omitted In Printing)

JUDGMENT OF CONVICTION

Whereas, on the 11th day of April, 1988, Defendant DAVID EDWARD RIGGINS, entered a plea of Not Guilty to the crime of Count II – Murder With Use of a Deadly Weapon, NRS 200.010, 200.030, 193.165.

WHEREAS, the Defendant, DAVID EDWARD RIGGINS, was tried before a Jury and the Defendant was found guilty of the crime of Count II – Murder in the First Degree With Use of Deadly Weapon, in violation of NRS 200.010, 200.300 and 193.165, and the Jury Verdict was returned on or about the 15th day of November, 1988. Thereafter, the same trial Jury, deliberating in the penalty phase of said trial, in accordance with the provisions of NRS 175.552 and 175.554, found that there was one aggravating circumstance in connection with the commission of said crime, to-wit:

The Murder was committed while the Defendant was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery, burglary or kidnapping in the first degree.

That on or about the 17th day of November, 1988, the Jury unanimously found, beyond a reasonable doubt, that there were nominating circumstances sufficient to outweigh the aggravating circumstances or cimcumstances,

and determined that the Defendant's punishment should be death in the Nevada State Prison located at or near Carson City, State of Nevada.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 28th day of December, 1988, in the City of Las Vegas, County of Clark, State of Nevada.

/s/ Paul (illegible)
DISTRICT JUDGE

IN THE SUPREME COURT OF THE
STATE OF NEVADA

DAVID E. RIGGINS,)
Appellant,) No. 19873
vs.)
THE STATE OF NEVADA,)
Respondent.)

OPINION

(Filed March 28, 1991)

By the Court, YOUNG, J.:

On November 20, 1987, appellant David Riggins rode with his roommate, Lowell Pendrey, to Paul Wade's apartment, where Pendrey waited outside while Riggins went in for about half an hour. Shortly after Riggins left Wade's apartment, Wade's girlfriend went to his apartment when she was unable to reach him by telephone. She found Wade dead on the floor with multiple stab wounds and a number of dog bites. Police arrested Riggins the next evening. He was charged with first degree murder and robbery, both with use of a deadly weapon. After being found competent to stand trial, Riggins pleaded not guilty and not guilty by reason of insanity. Following a four-day trial held in November 1988, Riggins was convicted by a jury of first degree murder and robbery, both with use of a deadly weapon. The jury sentenced Riggins to death.

Within a week of being incarcerated, starting in late November 1987, Riggins was put on Mellaril, an anti-psychotic drug. The medication was commenced because Riggins complained of hearing voices; he continued to be medicated through trial the following November, with increased dosages in December 1987, January, May, and July 1988. During February and March 1988 when Riggins was examined and found competent to stand trial, he was medicated with 450 mg. of Mellaril per day. At trial, Riggins was medicated with 800 mg. of Mellaril per day.

In June, defense counsel filed a motion to terminate administration of medication, arguing that medication during trial violated Riggins' right to present a defense and that Riggins had done nothing to demonstrate a need for medication. The State opposed the motion, contending that the medication was necessary to maintain Riggins' competency to stand trial. The court denied the motion following a hearing held in July.

On appeal, Riggins contends that his involuntary medication with antipsychotic drugs during the trial violated his Sixth Amendment right to a full and fair trial by depriving him of his right to present his natural demeanor to the jury as part of his insanity defense. Riggins also argues that the district court abused its discretion in denying his motion to terminate administration of medication. The State contends that the denial of the motion was within the discretion of the trial court and should not be disturbed on appeal absent a clear showing of abuse. *See, e.g.*, Sparks v. State, 96 Nev. 26, 30, 604 P.2d 802, 804 (1980).

The question whether forced medication during trial violates a defendant's constitutional right to present a defense is one of first impression in Nevada. Other states that have considered this question all agree that the accused's demeanor has probative value where his sanity is in issue. *See, e.g.*, Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983); State v. Law, 244 S.E.2d 302 (S.C. 1978). However, states are evenly divided over whether expert testimony about the effect of the medication can substitute for the jury's firsthand observation of the defendant's natural demeanor.

Those courts that have compelled medication have viewed the defendant's psychological makeup as evidence that can be explained to the jury. Accordingly, they have required that the jury be informed of the effect that the medication has on the defendant's behavior. *See, e.g., Law*, 244 S.E.2d 302. On the other hand, those courts that have upheld the defendant's right to be tried while unmedicated conclude that expert testimony may not substitute for firsthand observation of the defendant's natural demeanor. *See, e.g., Louraine*, 453 N.E.2d 437.

In this case, there was ample expert testimony regarding the effect that the Mellaril had on Riggins. After reviewing the differing decisions, we are persuaded that expert testimony was sufficient to inform the jury of the effect of the Mellaril on Riggins' demeanor and testimony. Accordingly, the district court did not abuse its discretion in denying the motion to terminate medication. Moreover, the denial of Riggins' motion to terminate medication did not deprive him of his rights to a full and fair trial and to present a defense. *Compare Law*, 244 S.E.2d at 306-307.

The jury's special verdict reveals that only one of the alleged aggravating circumstances was proved beyond a reasonable doubt: that the murder was committed while Riggins was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery, burglary, or kidnapping in the first degree. Riggins contends that the evidence was insufficient to establish burglary as an aggravating circumstance because there was no breaking and entering nor intent to commit a felony within Wade's house.

However, the instruction allowed the jury to find aggravation if Riggins was engaged in robbery *or* burglary. Because the jury found Riggins guilty of robbery during the guilt phase, they likely found that he committed the murder during the commission of the robbery, eliminating the necessity of establishing a breaking and entering with intent to commit a felony. We conclude that the jury's finding with respect to aggravation was supported by substantial evidence.

Riggins next contends that the voir dire violated his Sixth Amendment right to an impartial jury because the cursory questioning of the venire panel as a whole did not afford a reasonable assurance that individual prejudice would be revealed. Riggins also argues that the district court abused its discretion in denying his motion for individual sequestered voir dire.

In the designation of the record on appeal, Riggins' counsel designated "[a]ll pleadings and motions, the complete trial transcripts, *excluding voir dire*, and the Judgment of Conviction." (Emphasis added.) Thus, the

record does not contain a transcription of the voir dire. Nor does the record contain the State's oral opposition to the motion and the possible basis of the district court's ruling on sequestered voir dire because counsel did not designate transcripts of the hearing on the motion.

It is the responsibility of the objecting party to see that the record on appeal before the reviewing court contains the material to which they take exception. If such material is not contained in the record on appeal, the missing portions of the record are presumed to support the district court's decision, notwithstanding an appellant's bare allegations to the contrary. *See, e.g.*, State v. Zuck, 658 P.2d 162, 165-66 (Ariz. 1982); People v. Wells, 776 P.2d 386, 390 (Colo. 1989). Moreover, the scope and manner of voir dire examination is within the sound discretion of the district court and, on review, such discretion is accorded considerable latitude. Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 937-38 (1978) (quoting Oliver v. State, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969) and Spillers v. State, 84 Nev. 23, 27, 436 P.2d 18, 20 (1968)). For the foregoing reasons, we reject appellant's assignments of error regarding the voir dire examination.

Riggins next contends that the district court abused its discretion in denying his motion for co-counsel. He maintains that the court's failure to appoint co-counsel deprived him of his constitutional right to the effective assistance of counsel. After reviewing the record, however, we conclude that the district court did not abuse its discretion, pursuant to NRS 260.060, in denying the motion for co-counsel. *See* Sechrest v. State, 101 Nev. 360, 368, 705 P.2d 626, 632 (1985).

Riggins also contends that the district court abused its discretion in admitting a number of photographs during the penalty phase. He contends that the photographs, which depicted various scenes from the victim's apartment after the homicide, were duplicative because expert testimony and photographs previously admitted during the guilt phase were sufficient to illustrate the State's theory of murder by torture. Further, he asserts that the photographs were gory and inflammatory, and unduly prejudiced him. The State contends that the photographs were relevant and admissible to show torture, one of the three aggravating circumstances alleged by the prosecution.

Pursuant to NRS 48.035(2), the trial judge has discretion to exclude relevant evidence if its probative value is substantially outweighed by considerations including needless presentation of cumulative evidence. Moreover, under NRS 48.035(1), relevant evidence is not admissible if the danger of unfair prejudice substantially outweighs the probative value of the relevant evidence. However, NRS 175.552 allows evidence during the penalty hearing that may ordinarily be inadmissible.

Without deciding whether the photographs admitted during the penalty hearing were duplicative, we conclude that, given the trial court's broad discretion and the provisions of NRS 175.552, there was no error in allowing the photographs into evidence.

Lastly, Riggins contends that the district court erred in allowing the State to cross-examine Lowell Pendrey, the sole defense penalty phase witness, regarding his alleged homosexual relationship with Riggins. Riggins

asserts that the court further erred in allowing the State's rebuttal witness to testify concerning a conversation she overheard regarding this alleged relationship. Riggins contends that this testimony inflamed the jury and unduly prejudiced him, requiring a new penalty hearing.

During cross-examination, Pendrey denied having a conversation in which he allegedly acknowledged that he and Riggins were homosexual lovers. The prosecution then called Ellen Bezian, sister of the victim's girlfriend, to rebut Pendrey's truthfulness. Over defense counsel's objection, the court first ruled that the State's effort to impeach Pendrey with questions about the conversation did not involve a collateral matter. Following two additional objections by defense counsel, the court ordered stricken the entire conversation, apparently finding the conversation too tenuous for impeachment purposes. The court then instructed the jury to disregard the conversation.

We conclude that the cross-examination of Pendrey was proper for purposes of showing possible bias. Therefore, we conclude that the district court did not err in initially allowing the prosecutor to question Bezian about the conversation.

In reviewing the overall record, we conclude that Riggins' contentions lack merit and that the sentence was not excessive, considering both the crime and the individual characteristics of the defendant. We hereby affirm his death sentence and the underlying convictions of first degree murder and robbery with use of a deadly weapon.

/s/ Young, J.
Young

We concur:
/s/ Mowbray, C.J.
Mowbray
/s/ Steffen, J.
Steffen

ROSE, J., concurring:

I am concurring with the majority because I would have preferred two points to have been better established by the record. First, the fact that Riggins needed to be on the prescribed drug; and second, that he could not adequately function if the medication were terminated.

When Riggins was arrested, he complained of hearing voices and having trouble sleeping. He told Dr. Edward Quass, a psychiatrist, that he had taken Mellaril before and it had helped him. After a ten minute examination, Dr. Quass prescribed 100 milligrams a day because, as he said, Riggins had been on the drug before. Dr. Quass increased the amount to 800 milligrams a day because Riggins continued to hear voices and requested an increase in the dosage.

The court would not permit Riggins to terminate the massive dosage of Mellaril prior to trial to determine if he could function without the drug. Instead, the court relied on what psychiatrists thought would happen if the medication were stopped. A better method to determine the effects of stopping the medication would be to actually do so, and observe the results on the defendant. This is especially true in this case where two of the psychiatrists opined that Riggins' psychosis was probably caused by

drug abuse; and if that were the case, terminating the drug would have no effect on his behavior. Since two of the four psychiatrists believe that the termination of Mellaril would have no effect on Riggins, he should have been given the opportunity to suspend the taking of it and let it be seen if it had an effect on his behavior.

No defendant should be involuntarily medicated during his trial unless it is truly necessary. This is especially true in a capital case where the defense is insanity. A defendant's right to have the jury observe his actions and demeanor should not be prevented unless it is absolutely required. One way to determine if it is necessary would be to suspend the taking of the medication and observe the defendant's behavior. This was not done with Riggins.

However, we previously held that when a defendant is involuntarily medicated during trial, we will review the entire record to determine whether he was denied a fair trial and whether the defendant's appreciation of the events of trial was diminished. Lizotte v. State, 102 Nev. 238, 720 P.2d 1212 (1986). From my review of the record, Riggins was not denied a fair trial and it is not shown that he lacked an appreciation of the trial. Two psychiatrists who had prescribed Mellaril for Riggins, Dr. Quass and Dr. O'Gorman, testified that they believed it was helpful to him. Additional psychiatric testimony established that Mellaril may have increased Riggins' cognitive ability and prevented him from dangerous behavior.

While a review of the entire record meets the standard we set in *Lizotte*, I would prefer a stronger showing

that the medication was absolutely necessary, and evidence establishing how the defendant behaved without it.

/s/ Rose, J.
Rose

SPRINGER, J., dissenting:

This case is another[1] in which we are faced with a novel legal issue presented by courtesy of modern medical science. It seems that the medical doctors are now quite capable of conjuring in their insane clients a sort of "synthetic sanity"[2] by infusion into their brains a class of drugs, called variously "pyschotropic," "neuroleptic," or "antipsychotic." These drugs have been in use for perhaps thirty years and are known to act chemically on the nerve cell receptors of the brain in a manner – sometimes referred to as a "chemical lobotomy" – which rather drastically alters the thinking processes, emotional responses, behavior and appearance of those whose brains have been "seized"[3] by these powerful drugs.

So powerful are these drugs that a highly mentally disturbed insane person can be made to appear perfectly sane. These drugs so well mask underlying mental disorders that persons who are agreed by all to be mentally

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[1] *See*, for example, McKay v. Bergstedt, 106 Nev. ___, ___ P. 2d ___ (Adv. Opn. No. 142, Nov. 30, 1990) (Springer, J., dissenting).

[2] State v. Hampton, 218 So.2d 311, 312 (La. 1969).

[3] The word "neuroleptic" denotes a "seizure" of the nerves of the brain.

incompetent and thus unfit to stand trial can be drugged into a mental state in which psychotic symptoms disappear. There is, however, a price to pay for this "neurolepsis." The synthetically sane defendant becomes mentally and emotionally inert and in a state of chemically induced tranquility.[4] Wildly psychotic persons frequently become docile and apathetic. The medical literature frequently uses the "zombie" to describe the appearance and behavior of neuroleptic patients. The synthetically sane personality is characterized by indifference to what is going on and by "boredom, lethargy, docility and purposelessness."[5]

My point is very simple: I do not think that these drugs should be *forced* down the throats of these defendants, thereby inducing an unnatural and unwanted state of consciousness, just so the state can bring them to "justice." Riggins pleaded with the trial court to leave him alone and not allow the state to drug him into being someone he was not. I think the court erred when it refused to give Riggins protection from state mind-control drugging.

More and more of these kinds of cases are coming to the attention of this court. The following illustrates a representative pattern of the way in which psychotics are often treated in the criminal justice system. The procedures, which I now outline, do not necessarily fit exactly the facts of this case, but they do show the kinds

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[4] These drugs used to be called "major tranquilizers."

[5] *See* Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 Wis. L. Rev. 497, 512.

of medical and legal procedures that give rise to my concern. Here is the kind of treatment that I am talking about:

> *Stage One*: An obviously mentally disturbed person commits a crime. Police necessarily disturbed person commits a crime. Police necessarily refer the person to8mental health professionals."
>
> *Stage Two*: Psychiatrists or psychologists see the arrestee and, seeing that the person is confused, out of contact with reality and suffering from delusions and vivid auditory or visual hallucinations, conclude that the person is suffering from psychosis and should be institutionalized for treatment. (At this time the doctors frequently are in agreement that the arrested person was psychotic at the time of the commission of the crime.)
>
> *Stage Three:* The psychotic person is placed in confinement where "treatment" is instituted by administering the mentioned "major tranquilizers." Pretty soon the "patient" is "zombified" to the extent that he or she is no longer ranting or raving and, although a little sleepy most of the time, looks to be as sane as you or I.
>
> *Stage Four:* The then psychotic but synthetically same person is sent back to the criminal justice system with a doctor's certificate saying that the psychotic person is now sane and fit to stand trial.
>
> *Stage Five:* The synthetically sane zombie sits smilingly through the trial, listening indifferently to "experts" testify that he or she is presently mentally competent and was mentally competent at the time of committing the crime.

> The tranquilized defendant obligingly nods assent to whatever is being said.
>
> *Stage Six*. The jury understandably assumes that the defendant was as sane at the time of the crimes as he appears to be in court. The defendant is convicted. The drugs are withdrawn, and the psychotic state resumes.

I am hoping that this kind of drug abuse, this kind of intrusion into the inner sancta of human personalities will be seen for what it is, oppressive and violative of the human dignity of those who are forced to submit to the demands of the white-coated syringe bearers. For those who cannot see the outrage of this kind of mind control on its face, I will proceed now to cite legal authority for putting an end to these procedures.

Right to Appear and Defend

Forceful administration of these mind-altering drugs (particularly upon a person who has been declared legally sane[6]) is an interference with one's right to "appear and defend" against charges in a criminal case. With the use of these drugs medical science can now alter the chemical workings of the brain and radically interfere with one's emotional and thought processes. Before the advent of these drugs the United States Supreme Court was able to observe: "Freedom to think is absolute of its

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[6] In Ford v. District Court, 97 Nev. 578, 635 P.2d 578 (1981), this court, in issuing a writ of mandamus, stated that the trial court had exceeded its jurisdiction when it ordered a competent defendant to submit to the administration of drugs. One would think that the ruling in *Ford* was controlling in this case.

own nature; the most tyrannical government is powerless to control the inward workings of the mind." Jones v. Opelika, 316 U.S. 584, 6180 (1942) (Murphey, J., dissenting), *rev'd*, 319 U.S. 103 (1943). That was in 1942; it is, of course, no longer true that the government is powerless to control the inward workings of the mind. It can control the inward workings of the mind by forced druggings. The government, in this case, forcefully and over the strongest protest, was exerting control over the inner workings of the mind of David E. Riggins. Although "1984" has come and gone, the Orwellian "Thought Police" are now within the realm of scientific possibilities. As Justice Brandeis so wisely observed in his dissent in Olmstead v. United States, 277 U.S. 438, 479 (1927), "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." The state may be telling us that it is only "treating" these people for their own good, but it seems to me that the beneficent goal of treatment is being turned into an "insidious encroachment" on the dignity and integrity of humans who ought to have the right to refuse to be drugged into an unnaturally tranquil and submissive state.

The criminally accused have a fundamental right to be present at their trial and to confront witnesses against them. This right derives from the common law and is required by our sense of natural justice. Such rights are embodied in the sixth and fourteenth amendments to the

United States Constitution and in article 1, section 8 of the Nevada Constitution, which provides that "the party accused shall be allowed to appear and defend in person."

That right to be present at one's own trial necessarily means the right to be present as one really is, not as a chemical-conjured *persona* which bears little resemblance to the "real" person as he or she would be in the natural, undrugged state. Competent persons (as Riggins was judicially declared to be) defending against criminal charges should not, in any system of criminal justice, be compelled against their will to take into their brain drugs which radically alter their thinking, emotion and behavior.

In a case comparable to the one now before us, State v. Maryott, 492 P.2d 239 (Wash. App. 1971), the trial court allowed the state to continue administration of librium and other "minor" tranquilizers to the defendant against his will. The Washington Court of Appeals reversed his conviction, holding that to allow the state to administer drugs against the defendant's will was to allow the state to alter the judgment and mental capacity of its adversary. The court observed that "[o]ur total legal tradition is contrary to this." 492 P.2d at 241. I agree.

The *Maryott* court drew a parallel between the state's forced use of drugs and the use of chains and torture. Both affect the ability of an accused to use freely his mental faculties at trial. The court states that "[a]lthough drugs have not always been the subtle menace they now are in our society, action by the state which affected the

reason of a defendant at the time of trial was forbidden at an early time." *Id.* at 241.

A criminal defendant should not be deprived of his or her right to "appear and defend" by means of the state's forced administration of antipsychotic drugs. An accused has a right to be present at the trial in a natural state, free from the effects of modern mind meddling.

Right to Present Evidence

Riggins has also been denied his right to present relevant evidence, specifically, *himself*, in his true mental state. Where, as here, the sole issue at trial is the defendant's mental state, the most compelling evidence available is the defendant himself. No testimony of psychiatrists, psychologists, social workers, friends or family can approach the insight a jury is afforded by the opportunity to see and hear the defendant, *as is*. In order to be of any real benefit to the finders of fact the defendant must be presented in his natural state, not under the influence of mind altering drugs. It is the quality of Riggins' natural mental state that is at issue here. By distorting Riggins' natural mental condition, the state masked evidence critical to the sole issue at trial. The state was allowed to cover Riggins' personality with a chemical veil that prevented the jury from seeing the accused as he really was.

This court has previously recognized that the conduct and demeanor of a defendant after the crime are relevant to the jury's consideration of insanity at the time of the offense. Sollars v. State, 73 Nev. 248, 316 P.2d 917 (1957); State v. Lewis, 20 Nev. 333 (1889). The weight to be

given to the defendant's after-the-fact mental condition is a function of the jury. In *Sollars*, above, we quoted from 2 Wigmore on Evidence (3d ed.) 25, § 233:

> A condition of mental disease is always a more or less continuous one, either in latent tendency or in manifest operation. It is therefore proper, in order to ascertain the fact of its existence at a certain time, to consider its existence at a prior or subsequent time.

73 Nev. at 261, 316 P.2d at 924.

The courtroom demeanor of a defendant is the most reliable evidence of mental condition. Certainly an "expert" cannot draw a verbal picture of a defendant's condition that is anywhere near as reliable as would be an observation of the defendant in an undrugged, natural state. In State v. Lewis, above, we discussed the limitations of verbal description as opposed to direct observation:

> As a general rule it is undoubtedly true that it is the facts which a witness gives of the conduct, acts, manner, and conversations of the defendant which constitute the greatest value of his testimony, and that the testimony of a witness having but a limited knowledge upon these matters ordinarily has but little, if any, weight with the jury; but it is not true that a witness is bound to give, or that he can in all cases give, the glare of the eye, the wild look, the peculiar expressions, or strange demeanor of the defendant. *There are many cases where the mental condition of a person depends as much, or more, upon his looks and gestures, connected with his acts, conduct, or conversation, as upon the words and actions*

> *themselves;* and it would be difficult, and sometimes impossible, for the witness to intelligently give all of the details upon which his opinion is based

20 Nev. at 345-46 (emphasis added).

In Washington v. Texas, 388 U.S. 14, 19 (1967), the United States Supreme Court announced that few rights are more fundamental in our jurisprudence than that of an accused to present his or her version of the facts. Here Riggins was not permitted to present his version of the facts because evidence crucial to that version was suppressed by the drugs that had permeated his brain. Throughout the trial the jury sat and watched Riggins in a controlled and to the jurors what was apparently his normal mental state. Little wonder it is that the jury concluded that Riggins was in a similar, composed state at the time of the bizarre and brutal slaying in this case.

In disapproving the forceful administration of mind-altering drugs to criminal defendants, I do not mean to be understood as saying that these drugs should never be employed in a prosecutorial context. There may be times when the defendant himself may seek the help of these drugs; and there may even be ways in which the drugs can be employed in a manner in which the defendant's basic right to be and remain *himself* is not curtailed. I object only to forcing drugs upon people who do not want to be drugged.

/s/ Springer, J.
Springer

SUPREME COURT OF THE UNITED STATES

No. 90-8466

David Riggins,

Petitioner

v.

Nevada

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Nevada.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 7, 1991

No. 90-8466

In The

Supreme Court of the United States

October Term, 1991

DAVID E. RIGGINS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the forcible administration of anti-psychotic drugs to an insanity defendant[1] during trial violates the defendant's rights under the Due Process Clause of the Fourteenth Amendment.

2. Whether the forcible administration of anti-psychotic drugs to an insanity defendant in a capital case violates the defendant's Eighth Amendment right not to be subjected to cruel and unusual punishment.

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[1] In this brief, "insanity defendant" refers to a criminal defendant whose primary defense is that he was legally insane at the time of the crime.

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OPINIONS BELOW

The opinion of the Supreme Court of Nevada is reported at 808 P.2d 535 (Nev. 1991), and reproduced in the Joint Appendix ("J.A.") at 52-69. The Nevada District Court's order denying petitioner's motion to terminate the administration of medication is reproduced at J.A. 49.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on March 28, 1991. A motion to stay remittitur pending a Writ of Certiorari was granted by the Supreme Court of Nevada on April 15, 1991.

On June 13, 1991, petitioner filed a Petition for Writ of Certiorari, which was granted by this Court on October 7, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. The Eighth Amendment to the United States Constitution provides in relevant part: "[C]ruel and unusual punishments [shall not be] inflicted."

4. The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Petitioner David E. Riggins is presently under sentence of death after he was so heavily drugged by the State of Nevada that he appeared like a zombie throughout his trial. Despite Riggins' objection while competent to receiving medication during his trial, and despite substantial evidence that Riggins would have been competent to stand trial without medication, the State of Nevada forced Riggins to ingest extremely high dosages of the antipsychotic drug Mellaril each day of his trial. The medication sedated Riggins; it made him appear apathetic, uncaring, and without remorse. Riggins was therefore prevented from presenting the best evidence he had – his unmedicated demeanor – to support his only defense – that he was legally insane at the time of the crime.[1]

[1] The trial court instructed the jury that, under Nevada law, to establish an insanity defense, the defendant must prove

(Continued on following page)

The Court denied Riggins' motion to discontinue the medication, but it made no finding (1) that Riggins would have been incompetent without the medication; (2) that Riggins suffered from a mental disorder that was appropriately treated with Mellaril; or (3) that Riggins would present a danger to himself or others without medication.

Riggins was arrested on November 21, 1987, in connection with the death of Paul Wade. Soon after his arrest, he was examined by Dr. Edward Quass, a prison psychiatrist, because he had complained that he was hearing voices and having trouble sleeping. (R. 440). Riggins suffers from paranoid schizophrenia (J.A. 3-5, 11-12; R. 747-48), a psychosis characterized by "a disorder in the thinking processes, such as delusions and hallucinations." particularly "delusions of persecution." *Stedman's Medical Dictionary* 1261 (5th ed. 1982). Without medication he appears emotionally disturbed, exhibits "a considerable degree of nervous[ness]" (R. 460), is "delusional," "paranoid" and "very agitated" (J.A. 3-5) and experiences auditory hallucinations (R. 440).

Despite these symptoms, Dr. Quass believed Riggins was competent without medication. Nevertheless, he

(Continued from previous page)

by a preponderance of the evidence that, at the time of the crime, "he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." (R. 853)

prescribed the antipsychotic drug Mellaril[2] because Riggins "said that he had been on Mellaril in the past and it had worked for him." (R. 440-41). Dr. Quass started Riggins on a regimen of 25 milligrams of Mellaril, 4 times a day.

On January 13, 1988, Riggins moved to suspend his trial until it was determined whether he was competent to stand trial. (J.A. 6). By this time, his Mellaril prescription had been increased to 450 milligrams a day. (R. 91, 405, 465, 480). He was ultimately examined by three court-appointed psychiatrists. Two, Drs. Franklin D. Master and William D. O'Gorman, found the medicated Riggins competent to stand trial. (J.A. 7-10 (Master)); (R. 475, 488-89 (O'Gorman)). The third psychiatrist, Dr. Jack A. Jurasky, found the medicated Riggins incompetent. (J.A. 11-12). The trial court did not hold a competency hearing and, based solely on the psychiatrists' reports, found Riggins competent to stand trial. (J.A. 13-14).

On June 10, 1988, Riggins filed notice of his insanity defense (J.A. 25) and also moved to terminate the administration of Mellaril on the ground that continued medication would deprive him of his right to present a defense. (J.A. 20-24; R. 52-56). By then, Riggins' prescription for Mellaril had been increased again, this time to 800 milligrams a day, eight times the dosage of the original prescription. (R. 441-42). The State opposed this motion,

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[2] Mellaril is the product name for the antipsychotic drug thioridazine, which is commonly used in the treatment of acute and chronic schizophrenia. *The Physician's Desk Reference* 1950-52 (45th ed. 1991); *Merck Manual* 2486 (15th ed. 1987).

arguing that the medication was "essential for him in order for him to maintain his competence." (J.A. 32).

The trial court held a hearing on Riggins' motion the following month, at which Drs. Quass, Master and O'Gorman testified. Dr. Quass testified that Riggins would be competent to stand trial without any medication. (R. 443). Dr. Master testified that, while "[i]t is a possibility" that Riggins would become incompetent if the medication were stopped, there was no real "likelihood" of this happening (R. 414): "My guess is that taking [Riggins] off of medication would have no noticeable effect." (R. 411-12). Finally, Dr. O'Gorman testified that he had examined Riggins, without medication, in 1982 and that he had been competent at that time. (R. 475). Dr. O'Gorman said that he could not, however, render an opinion whether Riggins would become incompetent without medication, because he had not recently evaluated Riggins in an unmedicated condition. (R. 485). Thus, none of the psychiatrists testified that Riggins would likely become incompetent if the medication were discontinued. To the contrary, the only psychiatrist who had recently examined Riggins without medication – Dr. Quass – concluded that he was competent without medication.

While the trial judge acknowledged that it was merely a possibility that Riggins would become incompetent without medication (R. 502), he expressed concern about how long it would take "to bring back [Riggins'] competency to stand – continue with the trial" in the event he did become incompetent. (R. 417-18). But the trial, at that time, was still four months away, and the psychiatrists opined that, if Riggins' medication was stopped, it would take only ten days to four weeks to see

whether he was incompetent without medication (R. 419, 500), and, if he was, perhaps only several weeks of medication to restore his competency. (R. 418). Nonetheless, the trial judge rejected defense counsel's request to stop Riggins' medication in order to have him reevaluated for competency while unmedicated. (R. 500). Instead, the judge issued a one-page order that contained no findings of fact – let alone a finding that Riggins would become incompetent without medication – and denied Riggins' motion. (R. 108).[3]

Accordingly, Riggins was forced to ingest 800 milligrams of Mellaril each day of his trial, a dosage every psychiatrist considered excessive. Dr. Jurasky, who did not testify at the hearing but did testify at trial, described this dosage as enough to "tranquilize an elephant" (R. 752); Dr. Master considered it "just about the maximum amount of Mellaril that can be given before you get into a toxic range" (R. 415); and Dr. O'Gorman remarked that even 450 milligrams of Mellaril a day was "an extremely high dose" for Riggins (R. 473). It was no surprise, therefore, that Riggins was seen closing his eyes during the hearing on his motion to terminate the medication (R. 429-30) and had a zombie-like appearance throughout his trial.

Riggins' sole defense was insanity, and he took the stand to prove this. He testified about hearing the voices

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[3] The court's order did not indicate whether the judge considered Dr. Jurasky's reports. Dr. Jurasky concluded, based on interviews with Riggins on February 9, 1988 and June 6, 1988, that Riggins was incompetent to stand trial even while receiving medication. (J.A. 11-12, 18-19).

of "Satan and his assistant" who would order him to do certain things, such as hurt or kill people (R. 712-13); he described how, ten months before his arrest, he had been hospitalized after wandering on the streets in his underwear declaring that he was the son of John F. Kennedy and Marilyn Monroe and was sought by the Mafia (R. 739, J.A. 3); he said that Wade (the decedent) had once told him that he had killed two girls and wanted to kill Riggins before Riggins told the police (R. 719); he testified that Wade had tried to kill him by putting fiberglass in his water and by squirting AIDS-infected blood on his cocaine (Wade had supplied Riggins with drugs) (R. 716-17, 723, 741); he said that the voices of Satan and his assistant told him that killing Wade would be justifiable homicide (R. 723); and he explained that he killed Wade only after Wade attacked him with a knife (R. 719). Rather than presenting this bizarre testimony in the unmedicated condition he was in at the time of the offense (R. 740), the "synthetically sane" Riggins appeared rational, cool and unemotional. His testimony, therefore, did not sound truthful and obviously had no impact.

The State exploited Riggins' drug-induced demeanor during his trial, and in so doing, directly contradicted its pre-trial representations to the court. (R. 508-10). Before trial, the State had argued that Riggins needed to be heavily medicated because he was mentally ill, heard voices and would otherwise be incompetent to stand trial. (R. 451, 497). During the trial, however, it used its witnesses to paint an entirely different picture. Dr. Quass testified that Riggins was "rational and coherent" (R. 783, 879); Dr. O'Gorman testified that Riggins exaggerated the fact that he was hearing voices (R. 806, 880); and Dr.

Master testified that he "did not believe that [Riggins] had mental illness" (R. 828). The credibility of this testimony was buttressed by the fact that Riggins appeared perfectly sane at trial. The prosecutor then used his closing argument to focus the jury on Riggins' demeanor: "Does Riggins express sorrow, no. Does he express remorse, no." (R. 864).

The compelled medication also seriously prejudiced Riggins' efforts to present a defense during the penalty phase of the trial. Both mitigating factors that he sought to establish – (1) that he was "under the influence of extreme mental or emotional disturbance" at the time of the crime (R. 935-37), and (2) that he felt remorse for killing Wade – were undermined by the effects of the Mellaril. Rather than looking like the emotionally disturbed individual that he is, the heavily sedated Riggins sat calmly and impassively through the sentencing hearing. Although he wanted to express the grief and sorrow he felt for killing Wade, the medication prevented him from doing so, and, in fact, prevented him from reading a statement he had prepared expressing these sentiments. (R. 951-52).

As a direct result of the medication's effect on his defense, Riggins was convicted of capital murder on November 15, 1988, and sentenced to death on November 17, 1988. He appealed his conviction and sentence to the Supreme Court of Nevada, which specifically rejected his argument that involuntary medication during trial deprived him of his right to present his insanity defense. (J.A. 54).

In a concurring opinion, however, Justice Rose wrote that, in light of the psychiatrists' testimony, the trial court should have permitted Riggins "to terminate the massive dosage of Mellaril prior to trial to determine if he could function without the drug." (J.A. 59).

In dissent, Justice Springer recognized that an insanity defendant's most reliable and potent evidence is his "natural, undrugged, state" (J.A. 66-68), and stated that antipsychotic drugs not only deprive the defendant of this evidence, but make him appear "perfectly sane" while also rendering him "mentally and emotionally inert." (J.A. 61-62). He, therefore, concluded that, under this Court's precedents, the forced medication deprived Riggins of various constitutional rights, including the right to defend himself and present evidence of his true mental state at the time of the offense. (J.A. 64-69).

Petitioner requests that this Court reverse his conviction and sentence.

SUMMARY OF ARGUMENT

A criminal defendant has the fundamental right to testify in his own defense and to present evidence favorable to his defense. When the sole issue at trial is whether the defendant was legally insane at the time of the crime, his most compelling evidence is his natural demeanor. Forcing a mentally ill insanity defendant to ingest antipsychotic drugs during his trial, thereby suppressing his psychotic symptoms and making him appear sane, violates his right to testify and present a defense. Forcibly medicating an insanity defendant with antipsychotic

drugs also violates his Fifth Amendment rights by coercing him to present demeanor evidence that undercuts his defense and makes him appear apathetic and without remorse.

The State asserted no compelling interest to justify infringing these fundamental rights. Even if the State's interest in bringing Riggins to trial while competent would be sufficiently compelling to outweigh these rights, there was essentially no evidence that forcing Riggins to ingest 800 milligrams of Mellaril each day of his trial was necessary to maintain his competence. Moreover, the trial court had the alternative of stopping Riggins' medication to see if he would have become incompetent, but never tried this.

Although the evidence suggested that Riggins would have remained competent without medication, even if he would have become incompetent, he had the right, while competent, to waive his right to be tried while competent.

Forcibly medicating Riggins also infringed his fundamental right to refuse medical treatment, and the State advanced no interest substantial enough to justify infringing this right. Even if the State's interest in ensuring that a defendant is competent for trial is significant enough to outweigh this right, the State failed to prove by clear and convincing evidence – or, for that matter, even a preponderance of the evidence – that drugging Riggins was necessary to maintain his competency.

The compelled medication also violated Riggins' Eighth Amendment right to a fair sentencing determination. A defendant in the sentencing phase of a capital case has the right to present, and have the jury consider, any

relevant mitigating evidence. Forcing Riggins to appear at his trial under the influence of antipsychotic drugs prevented him from presenting his most compelling mitigating evidence – that he suffers from a serious mental illness and that he felt remorse for killing Wade.

ARGUMENT

I.

COMPELLED MEDICATION VIOLATED PETITIONER'S RIGHT TO PRESENT A DEFENSE AND HIS RIGHT AGAINST SELF-INCRIMINATION

A. Compelled Medication Violated Riggins' Right to Present A Defense

A criminal defendant's fundamental right to be heard in his own defense is guaranteed by the Due Process Clause of the Fourteenth Amendment, the Compulsory Process Clause of the Sixth Amendment and is a corollary to the Fifth Amendment's guarantee that no person in a criminal case can be compelled to be a witness against himself. *Rock v. Arkansas*, 483 U.S. 44 (1987). The accused's right to present his own version of the facts "is one of the rights that 'are essential to due process of law in a fair adversary process.' " *Id.* at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)); *accord Washington v. Texas*, 388 U.S. 14, 19 (1967).

When insanity is at issue, a defendant's right to be heard in his own defense involves more than testimony from the witness stand; the defendant's courtroom demeanor will necessarily have significant probative

value to the jury. *See Pate v. Robinson*, 383 U.S. 375, 385-86 (1966). Indeed, his own demeanor is perhaps the most persuasive evidence an insanity defendant can offer about his mental state at the time of the crime. When an insanity defendant takes the stand, as Riggins did, this is surely of paramount importance.

When an insanity defense is raised, the jury is likely to assess testimony concerning the defendant's mental state at the time of the crime with reference to his courtroom demeanor. *Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983); *see also* 4 *Wigmore on Evidence* § 1160 (rev. ed. 1972) ("it seems to be universally accepted that in whatever form the issue of insanity may be presented, the jury may take into consideration the behavior of the person as observed by them"). Indeed, in this case, the trial court instructed the jury to consider Riggins' "manner upon the stand" when assessing the credibility of his insanity defense. (R. 858). It is likely, therefore, that Riggins' calm and controlled demeanor at trial made the jury discount evidence that suggested he was insane at the time of the crime.

This Court has repeatedly held that depriving a defendant of the opportunity to present a defense violates the defendant's right to due process of law. In *Webb v. Texas*, 409 U.S. 95, 97-98 (1972), for example, the Court found that a trial judge's lecture to a defense witness about the consequences of perjury, causing that witness not to testify, violated the defendant's right to present his defense. Similarly, in *Ake v. Oklahoma*, 470 U.S. 68, 86-87 (1985), the Court held that a State's refusal to provide an indigent insanity defendant with the assistance of a psychiatrist to explore the merits of an insanity defense

violated his right to present a defense. *See also Brooks v. Tennessee*, 406 U.S. 605 (1972) (holding that a statute requiring a defendant desiring to testify to do so before any other defense witness testified violated the defendant's right to present his defense).

Moreover, it is well established that due process does not permit a State to suppress "evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Antipsychotic drugs work just for such a deprivation.

Antipsychotic drugs suppress psychotic symptoms; they make a mentally disturbed person appear calm, competent and sane. They also suppress a person's emotions, causing him to appear listless and apathetic. Antipsychotic drugs therefore undercut an effective insanity defense by misleading the jury as to the defendant's probable mental state at the time of the crime. *See generally* Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. Miami L. Rev. 1109 (1986); Note, *Antipsychotic Drugs and Fitness to Stand Trial: The Right of the Unfit Accused to Refuse Treatment*, 52 U. Chi. L. Rev. 773 (1985).

By drugging Riggins into an artificial sanity, the State deprived him of the opportunity to present hard evidence of his true mental condition. Rather than seeing Riggins as the extremely disturbed and irrational individual that he is (*see, e.g.*, J.A. 3-5; R. 494-95), the jury saw him as unemotional, indifferent, and remorseless, unmoved by trial testimony relating to the terrible acts he was accused

of committing. The Mellaril also defeated the purpose of Riggins taking the witness stand. His calm and impassive demeanor contradicted his bizarre testimony. Exposed only to a defendant who appeared sane during his trial – even while testifying – it was no surprise that the jury inferred that Riggins must have been sane at the time of the offense.

In short, by forcing Riggins to take antipsychotic drugs throughout his trial, the State effectively denied Riggins the opportunity, and therefore the right, to present his defense.[4]

In *Ake*, the Court emphasized that truth is the paramount goal of the adversary system. It found that a criminal trial is fundamentally unfair if the State is able to maintain "a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake*, 470 U.S. at 79. Truth was clearly suppressed in Riggins' trial. Neither the court-appointed psychiatrists who testified about Riggins' mental state at the time of the crime nor the jury ever saw Riggins in an unmedicated condition, as he was at the time of the crime. Compelling Riggins to appear sane at trial gave the State "a strategic advantage" that made the verdict unreliable. Indeed, depriving Riggins of the ability to offer evidence of his insanity through his demeanor

[4] Numerous state courts have so held. *See Commonwealth v. Louraine*, 453 N.E.2d 437, 442 (Mass. 1983); *State v. Hayes*, 389 A.2d 1379, 1381-82 (N.H. 1978); *In re Pray*, 336 A.2d 174, 176-77 (Vt. 1975); *State v. Maryott*, 492 P.2d 239, 242-44 (Wash. App. 1971).

was even more unfair than the deprivation of the assistance of a psychiatrist in *Ake*, because Riggins' evidence of insanity would have come directly from himself rather than through the filter of an outside observer. As Justice Springer recognized in his dissent below, "[n]o testimony of psychiatrists, psychologists, social workers, friends or family can approach the insight a jury is afforded by the opportunity to see and hear the defendant, *as is*. (J.A. 67 (emphasis in original)). A "live" demonstration of a defendant's mental condition is much more persuasive than the cold presentation of expert testimony.

In *Rock v. Arkansas*, 483 U.S. 44, 52 (1987), this Court reaffirmed that "an accused's right to present his own version of events in his own words" is fundamental. The Court explained that the source of this right is not only the Due Process Clause of the Fourteenth Amendment, but the Compulsory Process Clause of the Sixth Amendment, which applies to the States through the Fourteenth Amendment. *Id.; see also Washington v. Texas*, 388 U.S. 14, 17-19 (1967). The Compulsory Process Clause guarantees to a defendant the "fundamental" right to call "witnesses in his favor." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Logically included in this right is a defendant's right to testify himself, if he should decide that it is in his interest to do so. "In fact, the most important witness for the defense in many criminal cases is the defendant himself." *Rock*, 483 U.S. at 52. This certainly was true in Riggins' case: except for Dr. Jurasky, Riggins was the only defense witness.

In *Rock*, the Court found that a statute prohibiting a defendant from offering his hypnotically-refreshed testimony unconstitutionally restricted the defendant's right

to testify. Although the statute did not prevent the defendant from taking the witness stand, it "exclude[d] material portions of his testimony." *Id.* at 55. Here, although Riggins was able to take the stand, he was prevented from offering "material portions" of his testimony: his natural demeanor and his unmedicated thought processes. Nothing could have been more unfair to Riggins. His only defense depended on this evidence and its exclusion violated his rights to due process and compulsory process.

B. Compelled Medication Infringed Riggins' Fifth Amendment Right Against Self-Incrimination

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." This right against self-incrimination reflects our criminal justice system's fundamental values, such as "requiring the government, in its contest with the individual to shoulder the entire load." *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). The government is constitutionally required to establish guilt "by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

Compulsory medication violates an insanity defendant's Fifth Amendment rights in at least two ways: first, it makes it easier for the States to rebut the evidence proffered by the defendant on the question of his sanity, thereby undermining the requirement that the State "shoulder the entire load"; second, it forces the defendant

to effectively present evidence against himself by compelling him to appear unremorseful, apathetic and sane.

When Riggins took the stand in his own defense he was compelled to present the demeanor and thought processes of a sane person. He was compelled to appear indifferent, rational and unemotional. He thus became an instrument of his own conviction. Indeed, in violation of a pre-trial order (R. 508-10), the prosecutor used Riggins' demeanor at trial to challenge his veracity and to inflame the jury: "Mr. Riggins claims to hear voices. It's funny that his roommates never new that. He never told his roommate about those funny voices. . . . And does Riggins express sorrow, no. Does he express remorse, no. Is Riggins crazy, no." (R. 864). This prejudicial argument was further exacerbated by the court's instruction to the jury that "[t]he credibility of a witness shall be determined by his manner upon the stand." (R. 858).[5]

It was particularly unfair for the State to argue, as it did during the trial, that Riggins was not mentally ill (R. 828) and that he had fabricated his testimony about hearing voices. (R. 806, 822, 864, 880). The State had, of course, argued to the contrary before the trial when insisting that Riggins be medicated. (R. 451, 497). The State's trial strategy was akin to obtaining a conviction through the use of false evidence, something the Court has long condemned as violating the Due Process Clause of the Fourteenth Amendment, even if the false evidence goes only to the credibility of a witness. *See, e.g., Napue v.*

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[5] The trial court did not instruct the jury concerning how the Mellaril affected Riggins' demeanor and thought processes.

Illinois, 360 U.S. 264 (1959). The State's tactics were analogous to forcing a brown-haired defendant to dye his hair blond in order to fit an eyewitness description of the perpetrator.

Forcibly medicating Riggins therefore gave the State two "strategic advantages" that "cast a pall on the accuracy of the verdict obtained": the State was able to suppress evidence favorable to Riggins' defense while compelling him to present evidence prejudicial to that defense.

C. No Compelling State Interest Justified the Involuntary Medication of Riggins

Admittedly, the right to testify in one's own defense is not absolute; nonetheless, it would take a compelling state interest to justify infringing this fundamental right. *See, e.g., Duren v. Missouri*, 439 U.S. 357, 367-68 (1979) (a "significant State interest" is necessary to justify infringing a defendant's right to a jury trial from a fair cross-section of the community, and that "significant State interest [must] be manifestly and primarily advanced" by the State regulation that results in an unfair cross-section); *cf. Kramer v. Union School Dist. No. 15*, 395 U.S. 621, 627 (1969) (when a statute denies certain persons the right to vote, "the Court must determine whether the exclusions are necessary to promote a compelling State interest"); *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976) ("a significant impairment of First Amendment rights must survive exacting scrutiny"; "the interest advanced [by the State] must be paramount, one of vital importance"). There was no compelling State interest in this case. While

the State of Nevada has an interest in bringing to trial defendants accused of violating its laws and it may not subject an incompetent person to trial[6] – at least if the person has not waived his right to be tried while competent[7] – neither of those interests was implicated here.

Moreover, the State also has an interest in obtaining accurate verdicts in criminal cases, an interest that is undermined when a jury receives false information about the defendant's mental state, especially when that is the sole issue at trial. *See United States v. Charters*, 829 F.2d 479, 493-94 (4th Cir. 1987) ("the real government interest at issue here is not simply an interest in trying an accused; rather, the government's interest is in a fair trial in which the accused's guilt or innocence is correctly determined"), modified on rehearing, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1317 (1990). Thus, it is doubtful that a State's interest in making a defendant competent to stand trial can ever be so "compelling" where to do so requires medicating an insanity defendant with drugs that undermine his defense. *See Bee v. Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

Even if such an interest could be termed "compelling," there was little evidence in this case that forcing

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[6] *See Pate v. Robinson*, 383 U.S. 375 (1966). Under Nevada statutory law, "[a] person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." 5 Nev. Rev. Stat. § 178.400(1).

[7] *See* Section I.D. *infra*.

Riggins to ingest 800 milligrams of Mellaril each day of his trial was necessary to maintain his competence. None of the psychiatrists who testified believed it likely that Riggins would become incompetent without the medication. Indeed, only one psychiatrist who thought Riggins was competent while on Mellaril opined that there was even a "possibility" of Riggins becoming incompetent without the drug.[8] The State's concern that Riggins "*might* become incompetent during trial" (R. 498) without Mellaril was too tenuous to justify depriving Riggins of the fundamental right to testify in his own defense.

Certainly, the State's concern that an unmedicated Riggins might "fake a psychosis" was not compelling. (R. 498-99). Recognition of this concern would permit the State to medicate defendants for the express purpose of altering their demeanor, even when medication would have no beneficial effect and is not necessary to maintain the defendant's competence. *See Geders v. United States*, 425 U.S. 80 (1976) (order prohibiting defendant from consulting his attorney during an overnight recess held unconstitutional because the State's interest in cross-examining a defendant without the risk of improper "coaching" does not outweigh defendant's right to the assistance and guidance of counsel). Similarly, the State's concern that if Riggins did become incompetent without medication, there might be "a two-month delay to get him back to the period of where he's competent" (R. 499) was frivolous. The hearing on Riggins' motion to terminate medication occurred *four* months before trial. *See Ballew v. Georgia*, 435 U.S. 223, 243-44 (1978) ("savings in

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[8] This lack of the evidence is discussed further in Point II *infra*.

court time and in financial costs" does not justify reducing juries to the unconstitutional level of five members).

Even when a State can advance a compelling interest to restrict a defendant's fundamental right to testify, the means chosen to achieve that interest must be the least restrictive available. In *Illinois v. Allen*, 397 U.S. 337 (1970), for example, the Court considered how a trial court may properly limit the defendant's fundamental right to be present in the courtroom at every stage of his trial. The Court held that the right to be present was not absolute and could be limited when a trial judge is confronted with an obstreperous defendant. The Court said that the judge could handle the obstreperous defendant in at least three constitutionally permissible ways: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 344.[9] Not surprisingly, the Court found that the least acceptable of these alternatives would be binding and gagging the witness:

> [E]ven to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as *a last resort*. . . . [I]t [is] possible that the sight of shackles and gags *might have a significant effect on the jury's feelings about the defendant*.

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[9] *Illinois v. Allen* is cited by way of analogy. There is no evidence, and the State has never contended, that an orderly trial would have been impossible if Riggins had not been medicated.

Id. (emphasis added); *see also Estelle v. Williams*, 425 U.S. 501, 504-05 (1976) (trying a person in prison garb denigrates presumption of innocence); *Geders*, 425 U.S. at 91 (holding that trial court should have found a way "to deal with the problem of possible improper influence on testimony of 'coaching' of a witness short of putting a barrier between a client and counsel").

There were less restrictive alternatives available to assure that Riggins was competent to stand trial. For example, Riggins' medication could have been stopped to see if, in fact, he would become incompetent. Defense counsel suggested this (R. 500), and there was plenty of time to give this option a chance. During the hearing on the motion to terminate medication, which occurred nearly four months before trial, Dr. Master told the trial judge that, at most, it would take three or four weeks after medication was stopped to see whether Riggins would become incompetent. (R. 419). Dr. O'Gorman said it would take only "ten to fourteen days." (R. 485). Even if Riggins had become incompetent, it would only have taken several weeks to restore his competency. (R. 418). Accordingly, there was no legitimate reason not to employ this alternative. As Justice Rose said in his concurring opinion:

> A defendant's right to have the jury observe his actions and demeanor should not be prevented unless it is absolutely required. One way to determine if it is necessary would be to suspend the taking of the medication and observe the defendant's behavior. This was not done [but should have been done] with Riggins.

(J.A. 60).

In this case, mentally "shackling and gagging" Riggins was not the least restrictive means to accomplish the State's interest in assuring Riggins' competency to stand trial. If anything, it was the most intrusive and prejudicial means.

D. Riggins Was Denied his Right To Waive His Right To Be Tried While Competent

Although this Court has long recognized that the trial of an incompetent defendant violates due process, *see Pate v. Robinson*, 383 U.S. 375, 378 (1966), it has also recognized that a criminal defendant has the right to waive certain constitutional rights as long as the waiver is knowing and intelligent and made with adequate awareness of its consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970). Thus, a defendant may waive his privilege against self-incrimination, *Miranda v. Arizona*, 384 U.S. 436 (1966), his right to counsel, *Faretta v. California*, 422 U.S. 806 (1975), and his right to be present at trial, *Taylor v. United States*, 414 U.S. 17, 19 (1973).

Waiver is generally permitted when it will allow the defendant to achieve a desired litigation end. For example, a defendant may plead guilty and waive his right to a jury trial in order to obtain a lesser sentence. *Santobello v. New York*, 404 U.S. 257 (1971).

A competent defendant's right to waive his right to be tried while competent should also be permitted based on his Sixth Amendment right "personally to manage and conduct his own defense in a criminal case." *Faretta*, 422 U.S. at 817 (quoting *United States v. Plattner*, 330 F.2d 271, 274 (2nd Cir. 1964)). In *Faretta*, the Court held that the

Sixth Amendment guarantees a criminal defendant the right to represent himself, even though the assistance of counsel usually enhances a defendant's chances of being acquitted. Because it is the "defendant, and not the lawyer or the State, [who] will bear the personal consequences of a conviction, [i]t is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834. Waiver also should have been permitted out of the same respect for individual autonomy and freedom of choice that underlies a competent person's right to refuse "unwanted medical treatment." *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841, 2851 (1990).

The insanity defendant has a strong interest in appearing at trial in an unmedicated condition, even if that means he will be tried while incompetent, because the most probative evidence of his mental state at the time of the offense is likely to be his unmedicated demeanor. "Permitting the insanity defendant to be tried in an unmedicated state effectuates his Sixth Amendment right to personally manage and present his own defense, promotes the State's and the defendant's interest in accuracy of adjudication by providing the jury with the most trustworthy picture of the defendant's mental state at the time of the crime, and maximizes the defendant's right to self-determination and personal autonomy, a hallmark of our legal system." *Fentiman, supra,* at 1157-58.

Although an insanity defendant who chooses to be tried without medication may undermine his ability to assist his lawyer, "his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta,* 422 U.S. at 834 (quoting *Illinois v. Allen,* 397

U.S. at 350-51 (Brennan, J. concurring)). Accordingly, a defendant who is competent to stand trial only when medicated should, when competent, be permitted to waive his right not to be tried while incompetent, as long as he understands the consequences of his waiver. *Commonwealth v. Louraine,* 453 N.E.2d 437, 444 n.13 (Mass. 1983); *State v. Hayes,* 389 A.2d 1379, 1382 (N.H. 1978); *see generally* Winick, *Restructuring Competency to Stand Trial,* 32 UCLA L. Rev. 921, 950-78 (1985); *cf. Cruzan,* 110 S.Ct. at 2852 (recognizing right of incompetent person to refuse unwanted medical treatment if, while competent, the person expressed desire not to receive such treatment).

Riggins was competent at the time he requested that his medication be discontinued. The evidence suggested that Riggins would have remained competent if his medication were stopped. However, even if his mental condition would have deteriorated without medication, he had a right to be tried in that condition: the entire purpose of his motion to terminate his medication was to enable him "to fully present evidence to the jury pertaining to his mental condition at the time of the alleged offense, *i.e.,* to permit the jury to observe him free from the effects of the powerful antipsychotic Mellaril." (J.A. 42). Riggins should have been permitted to waive his right to be tried while competent.

II.

FORCIBLY MEDICATING PETITIONER VIOLATED HIS RIGHT TO A FAIR TRIAL BECAUSE IT VIOLATED HIS DUE PROCESS RIGHT TO REFUSE MEDICATION

While this Court has never considered under what circumstances, if any, a person can be forcibly medicated during his criminal trial, it has recognized that a person's liberty interests in his bodily and mental integrity and in privacy are implicated when a State seeks to medicate him against his will.

The context of a criminal trial makes the otherwise applicable standards governing forced medication inapposite, because the interests at stake are so different and because an extensive body of jurisprudence already exists which mandates that a criminal defendant be given a fair opportunity to defend himself. More specifically, as set forth in Section I of this brief, the nature of the insanity defense should bar the State from forcibly medicating an insanity defendant, at least absent a clear showing of compelling need.

Even if the Court should decide to look to its precedent concerning forced medication in the civil context, the State failed, in this case, to make an adequate showing to meet any conceivably applicable standard governing the determination to medicate. Moreover, the trial court, by failing to find facts supporting any bases for medication, failed to accord Riggins a constitutionally adequate procedure to determine if forced medication was appropriate. These failures resulted in a violation of

Riggins' constitutionally protected liberty interest and consequently deprived him of fair trial.

A. Riggins Has Fundamental Liberty Interests In Not Being Compelled To Ingest Antipsychotic Drugs

The Court has often found state invasions into the body repugnant to the liberty interests protected by the Due Process Clause. *See, e.g., Rochin v. California*, 342 U.S. 165, 209-10 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities"); *Winston v. Lee*, 470 U.S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"). Just last term, the Court held that competent individuals have "a constitutionally protected liberty interest in refusing unwanted medical treatment," regardless of whether their choices appear wise or foolish. *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841, 2851 (1990). The Court recognized that "no right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 2846 (quoting *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 252 (1891)).[10] And in *Washington v. Harper*, 110 S. Ct. 1028,

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[10] The Nevada Supreme Court itself has also declared that the right of a competent individual to refuse medical treatment is a "fundamental right." *McKay v. Bergstedt*, 801 P.2d 617, 621 (Nev. 1990).

1036 (1990), the Court specifically recognized that, even when incarcerated, an individual has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."[11]

In *Harper*, the Court held that, while in prison, a convicted criminal, although competent, may be involuntarily medicated with antipsychotic drugs if he is mentally ill, would pose a serious danger to himself or others without the drugs, and treatment with the drugs is medically appropriate. *Id.* at 1037 n.8, 1039-40. The Court explained that in the prison environment, where the State has well established "interests in prison safety and security," *id.* at 1037, a regulation that infringes a fundamental right need only be "reasonably related to legitimate penological interests." *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). But the Court held that the presence of

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[11] In addition to Riggins' liberty interest in avoiding the unwanted antipsychotic drugs, forcing him to ingest mind-altering drugs also implicated his First Amendment interests. Antipsychotic drugs, such as Mellaril, are – as this Court has recognized – compounds that affect the mind, intellectual functions, perception and emotions. *See Mills v. Rogers*, 457 U.S. 291, 293 n.1 (1982); *see also Bee v. Greaves*, 744 F.2d 1387, 1394 (10th Cir. 1984) ("Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate."), *cert. denied*, 469 U.S. 1214 (1985). The primary effects of these drugs, including Mellaril, is to alter mental processes and emotions that play a part in the development and expression of ideas and beliefs. (R. 408). Freedom of expression would be bereft of meaning were the government readily able to alter, shape and control mental processes. *See generally* Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. Miami L. Rev. 1, 58-59 (1989).

"ready alternatives" would be evidence that the prison regulation is not "reasonable." Moreover, the Court indicated that, outside the prison environment, the state's infringement of an individual's fundamental right to refuse unwanted medical treatment would be subject to the "rigorous standard of review" that ordinarily applies to infringements of fundamental rights. *Id.* at 1037-38. This is the standard that should have been applied in the instant case. Unlike Harper, who was a convicted criminal sentenced to prison, Riggins was merely a pre-trial detainee. As this Court held in *Bell v. Wolfish*, 441 U.S. 520, 545 (1979), "pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."

Given the significant liberty interests at stake in the decision to medicate an insanity defendant at a trial where his life is at stake, the State interests that could justify medicating Riggins had to be more compelling than the interests that justified medicating Harper. Moreover, those interests could justify forced medication only if the medication was also medically necessary and appropriate *and* no "ready alternative" for achieving that interest was available. *Harper*, 110 S. Ct. at 1037 n.8, 1038.

The only interest advanced by the State in Riggins' case that could possibly have justified forcing Riggins to ingest huge dosages of Mellaril was ensuring that Riggins was competent for trial. Unlike in *Harper*, the State did not advance its interest in "prison safety or security" or contend that Riggins would be dangerous to himself or others without the medication. And, as discussed in Point I of this brief, the State's purported interests in avoiding a

minor delay of Riggins' trial or in preventing Riggins from "faking a psychosis" were insubstantial.

B. Due Process Required the State to Prove by Clear and Convincing Evidence That Medicating Riggins Was Necessary to Achieve a Compelling State interest

Because of the gravity of the interests at stake when a State seeks to forcibly medicate an insanity defendant, due process requires a judicial hearing at which the state must prove by clear and convincing evidence that medication is necessary to achieve a compelling state interest.

"The function of the standard of proof . . . is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (*quoting In re: Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). The Court has required the "clear and convincing" standard "when the individual interests at stake in a State proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (*quoting Addington*, 441 U.S. at 424).

The liberty interests at stake when the State seeks to medicate a competent individual with antipsychotic drugs against his will are substantial, and are enhanced when the individual is an insanity defendant standing trial for a crime punishable by death. The defendant's interests in this context are of the utmost importance and should not be infringed absent "clear and convincing"

evidence that an infringement is necessary to achieve a compelling state interest.

The Court has required this standard of proof in the analogous context of civil commitment proceedings. In *Addington*, 441 U.S. at 433, the Court held that in a civil commitment proceeding a State must show clear and convincing evidence that its interest in commitment outweighs the individual's interest in continued liberty. The Court reasoned that in these proceedings, which threaten individuals with a substantial loss of liberty, the risk of an erroneous determination should fall on society. *Id.* at 427. The Court recognized the danger of making "psychological" determinations based on one or two instances of unusual conduct. "Increasing the burden of proof is one way to . . . perhaps reduce the chances that inappropriate commitments will be ordered." *Id.* If anything, the involuntary administration of antipsychotic drugs to a criminal defendant – and particularly to one who pleads insanity – for the purpose of making him competent to stand trial requires at least as high a standard as the one adopted in the civil context of *Addington*: "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself." *Id.* at 424.

The defendant should not bear the consequences of an erroneous decision that medication is necessary to maintain his competency. As with civil commitment, absent a strict burden of proof, involuntary medication could occur on the basis of "a few isolated instances of unusual conduct" or on the basis of a single brief psychiatric examination. This threatened deprivation risks particularly severe consequences for an insanity defendant. For these reasons, a burden of proof greater than a "mere

preponderance" is necessary to protect the rights at stake: an individual should "not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the State." *Id.* at 427.

C. The Facts Presented Did not Support Compelled Medication Under Any Conceivably Applicable Standard

The only interest advanced by the State in this case that could conceivably have overcome Riggins' compelling liberty interests was the State's interest in rendering him competent for trial. The State failed to demonstrate by clear and convincing evidence – or, for that matter, by even a preponderance of evidence – that forcing Riggins to ingest 800 milligrams of Mellaril each day of his trial was necessary to achieve its interest. It also failed to show that a smaller dosage of Mellaril or some less intrusive therapy would not have been sufficient to maintain Riggins' competency.[12] *See United States v. Charters*, 829 F.2d 479, 493 (4th Cir. 1987), modified on rehearing, 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1317 (1990); *Bee*, 744 F.2d at 1396.

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[12] Before compelling a person to ingest antipsychotic drugs for any reason, the State must also establish that the medication is medically necessary and appropriate. *See Washington v. Harper*, 110 S. Ct. 1028, 1037 n.8, 1039-40 (1990). No such showing was made in this case. To the contrary, several of the psychiatrists questioned whether Riggins should be taking such heavy dosages of Mellaril. (*See, e.g.*, R. 473-75 (Dr. O'Gorman)). Indeed, at trial, Dr. Master testified that "I would never prescribe Mellaril for Mr. Riggins as he is now." (R. 836; *See also* R. 836-38).

Three psychiatrists testified at the hearing to terminate medication, but none testified that he ever found Riggins to be incompetent. Dr. Quass, the prison psychiatrist who examined Riggins several times and who first prescribed Mellaril for him during his detention, testified: "Each time I have seen him [Riggins] I felt he would be competent to stand trial. . . . At the time he was started on Mellaril I considered him to be competent. He was not grossly psychotic at any time." (R. 443). Similarly, Dr. Master, who interviewed Riggins once in February 1988, stated that at that time – when Riggins was on nearly half the dosage of Mellaril that he was on at the time of trial – he found Riggins competent to stand trial. (R. 407). Finally, Dr. O'Gorman, who examined Riggins in March 1988 and who had treated him six years earlier, testified that he at no time viewed Riggins as an incompetent person. (R. 475).

Each psychiatrist also testified regarding what he considered the likely effects of stopping Riggins' medication. None stated that ceasing the medication would likely or probably cause Riggins to degenerate into an incompetent state. Dr. Quass testified that Riggins would be competent without medication. (R. 443). Dr. Master intimated that he had no idea how ceasing medication would affect Riggins: "It will have one of twelve different effects . . . [that] requires guessing the future." When persuaded to venture a guess, Dr. Master concluded: "My guess is that taking the patient – the defendant off of medication would have no noticeable effect," (R. 412) and would not render him incompetent. (R. 415). Finally, Dr. O'Gorman testified that he could not render an opinion as to the effects of taking Riggins off Mellaril. (R. 485).

In short, none of the three expert witnesses, who were the only witnesses at the hearing, offered any support for the State's contention that Riggins would become incompetent without medication. Their testimony, in fact, convincingly demonstrates the contrary – that Riggins was always a competent individual regardless of whether or not he was taking Mellaril. Only one psychiatrist "guessed" that it was even "possible" that Riggins would become incompetent. (R. 414). No evidence suggests, however, that the possibility was at all likely. Accordingly, this was not a case where the trial court had to assess the credibility of witnesses or the weight of evidence – there was simply no evidence supporting the State's position.[13]

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[13] Indeed, the State failed even to present evidence that would satisfy the *Washington v. Harper* test, which petitioner contends is inapposite in this context. *Harper* held that the Due Process Clause permits a State to medicate a convicted prisoner if the prisoner is dangerous to himself or others, and the treatment is in the prisoner's medical interest. *Harper*, 110 S. Ct. at 1037 n.8, 1039-40. Here, the State presented no evidence (because there was no evidence) that Riggins presented a danger to himself or others without medication. As discussed in note 12, *supra*, both Dr. O'Gorman and Dr. Master, the two court-appointed psychiatrists who testified for the State, questioned the necessity and the appropriateness of forcing Riggins to ingest 800 milligrams of Mellaril each day of his trial. (*See* R. 473-75, 836-38).

D. Due Process Required the Trial Court to Make Factual Findings on the Record

In light of the liberty interests at stake when an insanity defendant is medicated for trial, due process also requires the trial court to make specific factual findings on the record. Absent such findings, reviewing courts – such as this one – are handicapped in attempting to assess the manner in which a lower court reached its decision. The Federal Rules of Civil Procedure generally require federal trial courts in civil cases to "find the facts specifically and state separately their conclusions of law thereon." Fed. R. Civ. P. 52(a). Where the state seeks to force medication upon an insanity defendant who faces a potential death sentence, similar procedural protections are due.

The trial court's one-page order denying Riggins' motion to terminate medication (J.A. 49) made no finding of facts: it did not identify what State interest justified involuntary medication nor did it find that forcing Riggins to take 800 milligrams of Mellaril a day was medically necessary and appropriate. Indeed, the determination to medicate Riggins was made without reference to legal standards, without findings of any facts, and without reference to any burden of proof. It was, in fact, nothing more than a conclusory determination that in one judge's opinion, for unknown and unstated reasons, and based on unknown – and in this case, non-existent – evidence, the medication of Riggins should continue.[14] Such a procedure does not comport with due

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[14] The trial court's failure to set forth findings of fact justifying medication stands in sharp contrast to the court's

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process where significant liberty interests, and ultimately a man's life, are at stake.

III.

THE COMPELLED MEDICATION VIOLATED PETITIONER'S RIGHT TO A FAIR SENTENCING DETERMINATION

The State's involuntary medication also unfairly prejudiced Riggins in his effort to persuade the jury not to impose the death penalty, in violation of the Eighth Amendment. By denying Riggins the opportunity to present crucial evidence of his mental illness – namely, his own testimony regarding his thought processes, and his natural demeanor and physical appearance – the State denied him the opportunity to present crucial mitigating evidence, at a proceeding when nothing less than his life was at stake.

As this Court has repeatedly held, the finality of the death penalty makes it qualitatively different from a sentence of imprisonment. "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Ford v. Wainwright*, 477 U.S. 399, 412 (1986) (need for guarding

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disposition of Petitioner's motion to determine competency. In its order finding Riggins competent, the court set forth the evidence relied upon, and the specific factual finding that Riggins was "in possession of sufficient mental faculties to aid and assist counsel in his defense." (J.A. 13).

against error is "particularly acute" in procedure to determine prisoner's sanity for execution).

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), a plurality of the Court recognized that in order to give meaning to the individualized sentencing requirement in capital cases, the sentencer must be permitted to consider, "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense." This approach was adopted by a majority of the Court in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Eddings* held that the Eighth Amendment required that a capital sentencing scheme not only permit the defendant to present any relevant mitigating evidence, but required the sentencer "to listen" to that evidence. *Id.* at 115 n.10.

Since *Lockett* and *Eddings*, the Court has not hesitated to reverse a defendant's death sentence where a trial court has precluded or prevented a defendant from presenting mitigating evidence. In *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), for example, the Court unanimously reversed the petitioner's death sentence where the trial court excluded testimony relating to the petitioner's adjustment to prison. The Court held that the exclusion of this evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." *Id.*

More recently, in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), the Court held that a Texas statute which limited the sentencer's discretion to decline to impose the death penalty despite the defendant's mental retardation and abused background violated the Eighth Amendment, because the jury was not provided with a vehicle for

expressing its "reasoned moral response" to the mitigating evidence. The Court found that *Lockett* and *Eddings* compelled a remand for resentencing, so that the Court "not risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* (quoting *Lockett*, 458 U.S. at 605). *See also Hitchcock v. Dugger*, 481 U.S. 393 (1987) (remanding for resentencing where sentencer had been precluded from considering evidence relating to defendant's childhood and character).[15]

Thus, a long line of cases stand for the proposition that consideration of any relevant mitigating evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." *California v. Brown*, 479 U.S. 538, 541 (1987) (quoting *Woodson*, 428 U.S. at 304). That right was manifestly denied to David Riggins.

Riggins' most compelling mitigating evidence was that he suffers from a severe mental illness. Riggins sought to persuade the jury that his mental illness, at least in part, explained his actions at the time of the crime and should mitigate his punishment. (R. 935-36). Even if Riggins' mental illness did not render him legally insane at the time of the crime – which he contends it did – it certainly should have been considered to mitigate his

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[15] The importance of demeanor evidence in a capital case was highlighted in *State v. Murphy*, 355 P.2d 323 (Wash. 1960), where the court ordered a new trial for a defendant who had been sentenced to death after being tried in a drugged condition. The court reasoned that "the matter of the life or death of the accused may well depend upon the attitude, demeanor and appearance he presents to the members of the jury." *Id.* at 327.

culpability for the crime and weigh against the imposition of a death sentence. Because Riggins was precluded from presenting this evidence, the jury may well have believed that he was not mentally ill.

As discussed in Point I of this brief, the Mellaril made Riggins appear without remorse, uncaring, and rational. In addition, the effects of the Mellaril likely made Riggins unable to read a statement he had planned to read to the jury at the conclusion of the penalty phase of the trial. (R. 446-47). In this statement, Riggins said that he felt grief and remorse, that he regretted his actions, and that even under heavy sedation, he had trouble sleeping when he thought about the crime. (R. 951).[16]

The medication he was compelled to ingest dramatically altered Riggins' appearance before the jury. Instead of seeing a man who was concerned and nervous about his fate and remorseful for his actions, the jury was presented with a man who appeared cold, apathetic, and without remorse. No explanation or instruction could remedy this prejudice – and the Court did not even attempt to give one to the jury. Instead, the jury was left to sentence a man who was not the actual man before them, but a distortion of that man created for the express purpose of undermining his defense. Such a procedure can hardly be said to comport with the requirement of special reliability this Court has recognized as necessary for a procedure by which a State seeks to impose the

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[16] Riggins' statement was instead read to the jury by his counsel – an inadequate substitute for a defendant's personal expression of grief and remorse. (R. 951).

death penalty. David Riggins' death penalty must therefore be vacated.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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No. 90-8466

In The

Supreme Court of the United States

October Term, 1991

DAVID E. RIGGINS,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nevada

BRIEF FOR RESPONDENT

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ISSUES PRESENTED

1. Whether a pre-trial jail detainee, who is being medicated with anti-psychotic drugs at his own request, has an absolute, constitutional right under the Sixth Amendment and Due Process Clause of the Fourteenth Amendment of the United States Constitution to terminate that medication for tactical purposes at trial.

2. Whether the Petitioner's Eighth Amendment allegation is barred from consideration by this Court for failure to present said claim to the state courts of Nevada and to this Court in his Petition for Writ of Certiorari.

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DAVID E. RIGGINS,

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THE STATE OF NEVADA,

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner David Riggins was charged by Information with one count of Murder With Use of a Deadly Weapon and one count of Robbery With Use of a Deadly Weapon (J.A. 15-17). A jury trial was conducted and the jury returned verdicts of guilty as to both counts (ff. 234-235). A penalty phase hearing was conducted before the same jury to determine the appropriate penalty for the murder with the use of a deadly weapon count. The jury returned a verdict of death (J.A. 50-51).

Petitioner appealed his conviction to the Nevada Supreme Court and his conviction was affirmed (J.A. 52-69).

A. SUMMARY OF GUILT PHASE TESTIMONY

On November 22, 1987, David Riggins was arrested in connection with the murder and robbery of Paul Wade (ff. 637-638).

Lowell Pendrey, David Riggins' roommate at the time of the offense, testified at trial that at about 1:30 a.m., on November 20, 1987, he drove Petitioner to the residence of Paul Wade, where Petitioner told him he was going to borrow some money from a friend (ff. 585-587). After about half an hour, Riggins returned, opened the car door and got in (f. 588). Pendrey recalls the Petitioner had a beer in his hand and began talking. His appearance was not out of the ordinary (f. 589).

At about 3:00 a.m., that same morning, Patricia Bezian, Paul Wade's girlfriend, drove home and discovered Wade's dead body (ff. 617-618). She went to the phone to dial 9-1-1, but discovered the phone cord had been cut (f. 618).

A postmortem autopsy revealed that Wade had received 32 stab wounds, including wounds to the head, chest and back, and that he had died from the multiple wounds (ff. 537-546).

Tom Austin, another of Riggins' roommates, testified that two weeks before the murder, Riggins informed him that he expected to come into some money or some cocaine (ff. 701-702). He also testified that four days

before the homicide he noticed two of his kitchen knives were missing (f. 703).

The Defendant took the stand in his own defense (ff. 709-743). The Defendant testified that Paul Wade had tripped over his ironing board and had stabbed himself in the heart (ff. 719-720). He testified that Wade stabbed himself in the forehead (f. 720). The Defendant further testified that he wrestled the knife away from Paul Wade, and was backing up as Wade kept charging him (f. 721). He subsequently testified that he stabbed Paul Wade eight more times in the back as he was defending himself (ff. 721-722). On cross-examination, the Defendant admitted cutting Paul Wade thirty-two times in two minutes (f. 732). He also admitted that he requested to be medicated with Mellaril (f. 740).

Additional testimony relative to the question of Defendant's sanity at the time of the murder is contained within the Argument.

B. SUMMARY OF EVIDENTIARY HEARING TESTIMONY

The robbery and murder were committed on November 20, 1987, and Riggins was arrested the following day. Prior to a preliminary hearing being held in Justice Court, defense counsel made an oral motion to have the case transferred to District Court for the appointment of psychiatrists to examine Riggins to determine his competency to participate in court proceedings (ff. 290-294).

The motion was granted without objection by the State (f. 292). Riggins was examined by Doctor Master and Doctor Jurasky (See J.A. 7-12).

After reviewing their reports, the district court declared in an order dated March 18, 1988, that Riggins was sane and competent to stand trial. The court then remanded the matter back to Justice Court for a preliminary hearing (J.A. 13-14). The preliminary hearing was then conducted on March 28, 1988, after which Riggins was held to answer the charges in District Court (ff. 295-400).

Riggins appeared in District Court for arraignment on the charges on April 11, 1988. Trial was then set for June 27, 1988 (See Court Minutes, f. 994).

On June 10, 1988, defense counsel filed a short motion which requested the trial court to issue an order directing the medical section of the County jail to terminate the administration of medication prior to and during his trial which was then scheduled for June 27, 1988. The motion was based on the Fourteenth Amendment of the United States Constitution and Art. 1 § 8 of the Nevada Constitution (J.A. 20-24). Concurrently with the filing of said motion, defense counsel also filed a notice which indicated the Defendant intended to rely upon the affirmative defense of insanity at trial (J.A. 25).

On June 28, 1988, the State filed an opposition to the motion to terminate medication. The State also requested that the court order additional psychiatric examination in order to help determine Riggins' sanity (J.A. 26-40). On

July 8, 1988, counsel for Riggins filed a responsive pleading to the State's opposition to terminate medication (J.A. 41-48).

An evidentiary hearing was held on July 14, 1988, at which Dr. Master, Dr. Quass and Dr. O'Gorman testified. Dr. Jurasky had been subpoenaed for the hearing but was on vacation at the time (f. 455). His report was provided to the court, however, and the contents and conclusions of his report were commented on by the other expert witnesses.

DR. MASTER

Dr. Master is a board-certified psychiatrist. He examined Riggins on February 7, 1988 (f. 404). The interview occurred at the County jail and lasted approximately one hour. The purpose of the interview was to evaluate Riggins for competency and sanity (f. 404).

Dr. Master was advised by Riggins that he was currently taking 450 milligrams of Mellaril per day (f. 404). He also advised Dr. Master that he had been under the care of Dr. O'Gorman and had been taking Mellaril for six years (f. 405).

When asked how the termination of the administration of Mellaril would affect Riggins, he replied that, after two or three weeks, one of two things would occur. If Riggins did actually have a thought disorder which required the ingestion of Mellaril to alleviate, then absent the medication, he would become grossly psychotic and illogical and therefore would be rendered incompetent.

If Riggins did not have a schizophrenic thinking disorder stopping the medication would have no effect, assuming that Riggins also abstained from street drug use (ff. 410-411).

Dr. Master testified that he had read Dr. Jurasky's report in which Dr. Jurasky concluded that Riggins was incompetent to stand trial and if the medication was terminated, Riggins would most likely regress to manifest psychosis (f. 411; J.A. 11-12, 18-19).

Dr. Master disagreed with Dr. Jurasky's evaluation of Riggins as suffering from schizophrenia (f. 412). He believed he was an anti-social personality with intermittent toxic psychosis (ff. 430-431). He therefore concluded that terminating the medication would probably not have a noticeable effect on Riggins' behavior (f. 412). However, Dr. Master did acknowledge that he had only seen Riggins once and at that time he was on 450 mg per day of Mellaril. The prosecutor asked him whether he believed Riggins would become incompetent if the administration of Mellaril were stopped. He replied that he did not think so but there was always that possibility (ff. 414-415). Dr. Master thought Riggins was manipulative and had the potential to fake psychosis in a courtroom setting (f. 413).

When advised that Riggins was currently on 800 mg of Mellaril per day, Dr. Master stated that he had not seen the medical records but would assume that an increase from 450 mg per day to 800 indicated that whoever prescribed the increase must have seen strong indications of worsening psychosis (f. 415).

Dr. Master noted that, in court, Riggins had been carrying on normal conversations and did not appear to

be sedated or groggy (f. 416). If the medication were terminated and Riggins began to manifest unusual or bizarre behavior, then he would need to be reevaluated to determine his competency.

If found to be incompetent it could take weeks to months of restabilization to return him to a state of competency (ff. 417-418). If the medication was terminated, it would take two to three weeks for the medication to completely disappear from Riggins' system. It would take another three to four weeks after termination before any signs of psychosis would appear (f. 419).

Dr. Master believed that at the time of the crimes, there was a strong possibility that the Defendant was under a toxic influence of cocaine and that the use of cocaine would have determined his mental status. Consequently, Riggins' courtroom demeanor at the time of trial would not be the same as his demeanor at the time of the commission of the crimes (f. 427).

DR. QUASS

Dr. Quass is employed by the Las Vegas Medical Center, which contracts with the County jail to provide medical services (ff. 438-439). He first saw Riggins in November, 1987, in response to complaints from Riggins that he was hearing voices and having trouble sleeping (f. 440). Riggins advised Dr. Quass that he had been prescribed Mellaril in the past and that it had worked for him (ff. 440-441).

The initial prescription was 100 mg per day. Because Riggins continued to complain of hearing voices and

difficulty in sleeping, the dosage was increased several times until the current dosage of 800 mg per day was reached (ff. 441-442, 447-449). Each time Dr. Quass interviewed Riggins, he believed him competent to stand trial. Dr. Quass believed that Riggins would remain competent even if the medication were terminated. He did not feel that Riggins was grossly psychotic, although he acknowledged the question of whether to terminate the medication was a judgment call and the possibility existed that Riggins could become psychotic if the medication was stopped (ff. 443-444).

Dr. Quass noted that a normal person taking 800 mg of Mellaril per day who was not psychotic would be very groggy and very drowsy. Dr. Quass observed that Riggins "obviously tolerates it very well." (f. 447). Because of Riggins' continued complaint of hearing voices, Dr. Quass believed it more prudent to maintain the medication (f. 451).

Dr. Quass thought Riggins suffered from a paranoid personality but did not believe he was schizophrenic. A person with a schizophrenic personality tends to lose touch with reality whereas a paranoid personality does not (f. 449).

When advised that Dr. O'Gorman could present testimony that afternoon, the court indicated that it would like to hear his testimony (f. 454).

DR. O'GORMAN

Dr. O'Gorman first met with Riggins on September 27, 1982. The Defendant complained of nervousness. Dr.

O'Gorman believed it to be an anxiety reaction that was caused by excessive use of hallucinogenic drugs (ff. 460-461). Dr. O'Gorman prescribed thirty milligrams of Mellaril per day for reduction of anxiety (f. 461). Dr. O'Gorman saw Riggins again in early October, 1982 and discovered that Riggins had, on his own, trebled the dose of Mellaril O'Gorman had originally prescribed (f. 462).

He next saw Riggins in March, 1988, at the County jail (f. 462). At that time, Riggins was taking 400 mg of Mellaril per day (f. 463).

The doctor testified that if Riggins continued to take Mellaril during trial he would be more calm and relaxed. The doctor stated, "He does have considerable anxiety when he has to – when he anticipates even going to court. He did mention that to me on the 5th of March." (ff. 464-465). The doctor added that Mellaril acts as an effective tranquilizer without producing any artificial state of well-being (f. 465).

Dr. O'Gorman reviewed Dr. Jurasky's report prior to testifying. With respect to Riggins' statement to Dr. Jurasky regarding hearing the voices of Satan and his assistant, Dr. O'Gorman thought that Riggins made it up to influence Dr. Jurasky's opinion of his mental condition (ff. 471-472).

When asked whether he believed the court should order the continued medication of Riggins for trial, he thought that the medication should be continued if Riggins appeared to be experiencing hallucinations but that the dose level should possibly be reevaluated (f. 475).

Although O'Gorman testified that 800 mg per day was a high dose, he noted that Riggins had a high tolerance for chemicals because of his longstanding history of drug abuse (ff. 473-474). When asked if he could express an opinion as to whether Riggins' courtroom demeanor would be affected by Mellaril he could not (f. 476).

O'Gorman's 1982 examination resulted in a diagnosis of schizophrenic reaction, undifferentiated type, secondary to the abuse of chemicals. It is a condition common to drug abusers. Riggins, in his view, was not a paranoid schizophrenic (f. 478).

When asked if he believed Riggins would remain competent if the administration of Mellaril was stopped, he did not know. He said that he would have to wait and see (f. 485).

At the conclusion of the testimony the matter was argued to the court and the court took the matter under advisement. Two weeks later, on July 28, 1988, the trial court signed an order denying counsel's motion to terminate medication (J.A. 49).

SUMMARY OF ARGUMENT

I

The State of Nevada has a compelling interest in rendering Petitioner competent for trial which outweighs his liberty interest in refusing medication. This Court has held that a significant state interest may justify the

infringement of a prisoner's or a pre-trial detainee's constitutional rights, and the State need not show a compelling necessity in justifying these infringements. The evidence presented at the evidentiary hearing was sufficient for the trial court judge to believe that medicating Riggins was reasonably necessary to maintain his competence. Nowhere in the record is there any objective evidence that Defendant was cognitively impaired by the medication, a factor of great significance in the argument that Petitioner does not have an absolute right not to be medicated against his will. Furthermore, defense counsel conceded, in his motion to terminate medication, the propriety of medicating Petitioner at trial in order to render him competent for trial.

The State's interest in the safety of Petitioner and others was legitimate in light of expert testimony that Petitioner might regress to "manifest psychosis" if taken off the medication and start "acting on his hallucinations."

Finally, the trial court concerns about undue delay were valid in light of testimony that it could take several months to render Petitioner competent if taken off the medication, and in light of the fact that trial was scheduled for only ten weeks away at the time of the evidentiary hearing on the motion to terminate medication.

II

a.

The State of Nevada argues that the right to present demeanor evidence is not encompassed in the Fourteenth

and Sixth Amendment rights to present a defense. However, even assuming the right to present a defense were found in these constitutional amendments, that right is not absolute and may bow to countervailing state interests.

Furthermore, demeanor evidence at trial, where there has been a lapse of time and other intervening factors, is of dubious probative value of a defendant's mental state at the time of the crime. Testimonial evidence of the defendant's mental state at the time of the offense is therefore preferable where taking a defendant off medication may render him incompetent.

b.

Because the Fifth Amendment privilege against self-incrimination applies only to testimonial or communicative evidence, Petitioner's argument that he was forced to be an "instrument of his own conviction" in violation of the Fifth Amendment, by appearing at trial in a medicated state, is meritless.

c.

In Nevada, competency is a jurisdictional requirement for a criminal prosecution. Therefore, Riggins can not waive his right to be competent at trial. Furthermore, this Court has held that the power to waive a constitutional right does not carry with it the right to insist on the opposite of that right. In light of the Constitutional principle protected by the Nevada rule, the right not to be

tried while incompetent, it is difficult to understand how Petitioner can assert that a constitutional right has been violated.

d.

There is no requirement in Nevada that a trial court make a written finding of fact with respect to a pre-trial motion to terminate medication. Furthermore, the record shows that the trial court went to extensive efforts to determine the necessity of continued medication in hearing from three psychiatrist at the evidentiary hearing.

III

Petitioner is precluded from raising the argument that the medication over objection of Petitioner violated his Eighth Amendment protection against cruel and unusual punishment, since he failed to raise this argument either on direct appeal or in his Petition for Writ of Certiorari.

Furthermore, Petitioner was never prevented from presenting evidence of his mental state at the time of trial or at the time of the offense. The compelling interest in rendering Petitioner competent for trial justified any restriction in the manner in which the evidence was presented.

Finally, in seeking to re-raise the issue of Defendant's sanity at the Penalty Phase, Petitioner is improperly asking the jury to reconsider its residual doubt over a crucial element of Defendant's guilt or innocence – his sanity.

ARGUMENT

I

THE STATE OF NEVADA HAS A COMPELLING INTEREST IN RENDERING PETITIONER COMPETENT FOR TRIAL, AND IN EXERCISING ITS PARENS PATRIAE POWER, WHICH JUSTIFIES THE INFRINGEMENT ON PETITIONER'S LIBERTY INTEREST IN NOT BEING MEDICATED AT TRIAL OVER HIS ATTORNEY'S OBJECTION

Nevada does not dispute Petitioner's contention that a criminal defendant has a significant liberty interest in avoiding the unwanted administering of medication. *Washington v. Harper*, ___ U.S. ___, 110 S.Ct. 1028 (1990). However, the State's interest in rendering Petitioner competent for trial and in ensuring the welfare of the Petitioner and others justifies an infringement of this interest.

Nevada Revised Statute (NRS) 178.400(1) states: "A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." NRS 178.405 states, in relevant part:

> When an indictment or information is called for trial . . . if doubt arises as to the competence of the defendant, the court *shall suspend the trial* of the indictment or information . . . until the question of competence is determined.

Since the competence of a defendant to stand trial is jurisdictional in Nevada,[1] a defendant might,

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[1] At the evidentiary hearing on the motion to terminate medication, defense counsel conceded that competency is jurisdictional and competency could not be waived (f. 425).

theoretically, indefinitely postpone his trial on the merits if he is in a position to legally refuse to receive medication which may be necessary to maintain his competence.

Numerous state courts have held that rendering a criminal defendant competent for trial is a compelling state interest which justifies administering medication over defendant's objection. *State v. Law*, 244 S.E.2d 302 (S.C. 1978); *State v. Jojola*, 553 P.2d 1296, 1299-1300 (N.M. Ct.App. 1976); *State v. Buie*, 254 S.E.2d 26, 28 (N.C. 1979), *cert. denied*, 444 U.S. 971 (1979); *Ake v. State*, 663 P.2d 1, 6-7 (Okla. Crim. App. 1983), *rev'd on other grounds; State v. Stacy*, 556 S.W.2d 552, 557-559 (Tenn. Crim. App. 1977). In *State v. Law, supra*, the Supreme Court of South Carolina held:

> It is our view that medication may be administered without the consent of a defendant under compelling circumstances, including those where the medication is necessary to render a defendant competent to stand trial. We are of the opinion that such necessity would constitute a compelling state interest justifying infringment upon the right to bodily integrity.

Id. at 307.

This Court has also held that a significant state interest may justify the infringement of a prisoner's or pretrial detainee's constitutional rights. In *Harper, supra*, this Court held that the forced medication of a convicted prisoner would be upheld, even though it impinges on the inmate's constitutional rights, if such action is "reasonably related to legitimate penological interests." *Id.*,

S.Ct. at 1038, citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S.Ct. 2400 (1987). The Court stated:

> The legitimacy, and the necessity, of considering the state's interest in prison safety and security are well established by our cases.

Harper, Id., S.Ct. at 1037. Although *Harper* involved prisoners already convicted of crimes, and not pre-trial detainees as in the case at bar, this Court has suggested that the State has a similar interest with respect to pre-trial detainees. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979). In *Bell*, Justice Rehnquist held that the State may impose infringements on a pre-trial detainee in order to ensure the detainee's presence at trial and to ensure the effective management of the detention facility, *Id.* at 540, S.Ct. at 1875, and the State need not show a "compelling necessity" in justifying these infringements. *Id.* at 522, S.Ct. at 1870. In *Harper, supra*, this Court held that the State need only show that the forced medication was "reasonably related" to the State's legitimate penological interests, *Id.* at S.Ct. 1037, citing *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987), and held that the lower court's holding that the State prove its interest by "clear, cogent, and convincing" evidence was not the proper standard. *Id.* S.Ct. at 1044. Petitioner's contention that the State of Nevada is required to prove by "clear and convincing evidence" that medicating Riggins was necessary to achieve a compelling state interest is thus without merit.

The evidence showing the need to continue Riggins' medication throughout trial was presented at an evidentiary hearing held on July 14, 1988 (ff. 401-505). The trial court judge heard testimony from three psychiatrists, two of whom, Drs. Quass and Master, questioned whether

Riggins was truly schizophrenic, but who believed there was a possibility that if he was, he might regress to incompetency if taken off the medication (ff. 413, 444). The third, Dr. O'Gorman, could not say with any certainty whether Riggins would regress to incompetence (f. 476). The court also heard from a report prepared by Dr. Jurasky, who wrote that if taken off medication, Riggins would "most likely regress to a manifest psychosis and become extremely difficult to manage (f. 95).

There is also substantial evidence that Defendant was not cognitively impaired in any way by the medication, a fact of great significance in the Due Process analysis. Numerous state courts have held that in the absence of evidence that defendant's thought processes or the contents of defendant's thoughts were affected by the medication, there is no due process violation. See e.g. *State v. Jojola, supra; Jones v. State*, 71 Wis.2d 750, 238 N.W.2d 741 (1976); *State v. Arndt*, 1 Or.App. 608, 465 P.2d 486 (1970); *State v. Gwaltney*, 77 Wash.2d 906, 468 P.2d 433 (1970). Dr. Master testified at the evidentiary hearing that Mellaril renders a person rational, competent and logical, and that Riggins in fact appeared this way (f. 414). Dr. Quass testified at the hearing that anti-psychotic drugs such as Mellaril suppress a person emotionally but not cognitively, and that a person taking Mellaril would still have the ability to communicate, understand and to take part in courtroom proceedings (f. 446). Dr. O'Gorman also testified that he believes Mellaril controls emotions but does not affect a defendant's ability to communicate and assist his counsel (f. 466). Although no evidence of Petitioner's demeanor or cognitive abilities was presented at trial, Dr. Jurasky testified at trial that, in his opinion, the

Mellaril "allowed [the defendant] to act in a more or less normal manner" (f. 753), that Mellaril made the Petitioner "think more clearly" (f. 761), helped him communicate more effectively and "actually enhances his ability to take part in court proceedings" (f. 762).

In light of the facts on the record, references in Petitioner's brief to his "zombie-like appearance" at trial are pernicious and irresponsible. All references in Petitioner's brief to the "apathetic", "flat", and "emotionless" state of Petitioner are simply not supported in the record. It is inconceivable that defense counsel would have proceeded with the trial if Petitioner indeed appeared as a zombie throughout trial or was unable to assist counsel at trial. The repeated references in Petitioner's and Amici's briefs to Dr. Jurasky's statement that 800 milligrams of Mellaril is "enough to tranquilize an elephant" are equally disingenuous. The statement, a gratuitous and non-responsive comment by Dr. Jurasky during the prosecution's cross-examination, is obviously hyperbolic and was not supported by any scientific authority. It was merely his way of explaining that 800 mg per day was large dose, a fact not disputed by the State.

Furthermore, although Petitioner claims in his brief that the "State does not advance its interest in 'prison safety or security' or contend that Riggins would be dangerous to himself or others without medication" (p. 29), these were clearly concerns of the trial judge in determining that Riggins should remain medicated. In fact, Dr. Jurasky, in his pre-trial evaluations of Petitioner

on February 9, 1988 and June 8, 1988, wrote that Petitioner "must be considered potentially dangerous to himself and others" (f. 94) and "if taken off medication [the petitioner] would most likely regress to a manifest psychosis and become extremely difficult to manage." (f. 95). When informed of the potential side-effects of Mellaril, the trial court judge requested records from the County jail to determine if Petitioner was receiving or needed additional medication to counteract these effects and asked defense counsel for follow-up with that concern (ff. 98-99). It is clear, despite Petitioner's contentions, that the well-being of the Petitioner and the safety of others was of concern to the court. The State clearly had a legitimate interest in seeing that Riggins received appropriate treatment.

Finally, and despite Petitioner's allegations, the trial court's concerns about undue delay were valid. Drs. O'Gorman and Master testified that there existed a possibility that if taken off the medication, it could take two to three weeks for any psychotic regression to manifest itself (ff. 410, 487), then weeks or months of renewed drug therapy to bring Petitioner back to competence (ff. 417, 489). Petitioner points out that the trial did not take place until more than four months after the evidentiary hearing, and alleges that there was thus ample time to observe Petitioner's behavior off medication and re-medicate him should he relapse into psychosis. However, on the date Petitioner filed the Motion to Terminate Medication, June 10, 1988, trial was set for June 27, 1988 – only seventeen days away. On the date of the evidentiary hearing for the motion to terminate medication, July 14, 1988, trial had been rescheduled for September 26, 1988,

less than ten weeks away. On September 19, 1988, one week before the set trial date, Petitioner obtained a continuance which brought the trial to its final date, November 7, 1988. Thus, the trial court had, at all times following Petitioner's motion to terminate medication, legitimate time constraint concerns.

It bears noting that defense counsel, in his motions to terminate medication, conceded the propriety of medicating Petitioner at trial in order to render him competent to assist counsel (J.A. 42). Petitioner's position now, that the competency of criminal defendant is not a compelling interest of the State and can be waived, is contradictory to his original position. The trial court was thus within its sound discretion in rejecting the proposal of experimenting with the effect of the drugs on the Petitioner.

II

THE STATE OF NEVADA HAS A COMPELLING INTEREST IN RENDERING PETITIONER COMPETENT FOR TRIAL, AND IN EXERCISING ITS PARENS PATRIAE POWER, WHICH OUTWEIGHS PETITIONER'S INTEREST, IF ANY, IN PRESENTING HIS "NATURAL DEMEANOR" AT TRIAL

A. The State Interest In Rendering Petitioner Competent For Trial And In Ensuring The Welfare And Safety Of Petitioner And Others Justifies The Infringement, If Any, On Petitioner's Sixth And Fourteenth Amendment Right To Present A Defense.

The infringement on Petitioner's Fourteenth and Sixth Amendment rights to present a defense, if any, was

also justified by the state's interest in rendering Defendant competent for trial and in ensuring the welfare of the Petitioner and others. Furthermore, although the Fourteenth and Sixth Amendments grant a criminal defendant the right to present a defense, this right does not encompass the right to appear unmedicated at trial. The Petitioner cites *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987), as holding that an accused's right to present his own version of the facts "is one of the rights that 'are essential to due process of law in a fair adversary process.' " In *Rock*, this Court held unconstitutional a state law that made hypnotically-induced testimony inadmissible per se. In the majority opinion, Justice Blackmun wrote:

> The right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary system.'

Id. at 51, S.Ct. at 2708, 2709, citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533 (1975). Because the per se rule of inadmissibility arbitrarily excluded material portions of the defendant's testimony, the majority held, it violated the defendant's Fourteenth and Sixth Amendment rights "to offer his own testimony," to "personally" make his defense, and "to present his own version of events in his own words." *Rock*, at 52, S.Ct. at 2709.

Whether or not the above rights are in fact found in the Sixth and Fourteenth Amendments, it is clear that the right to appear unmedicated at trial is not. While it may be said that laws which arbitrarily exclude testimony (see *Rock, supra*), which allow a trial judge to lecture a defense witness about the consequences of perjury, thus causing

the witness not to testify (see *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351 (1972)), or which require a defendant wishing to testify on his own behalf to do so before all other defense witnesses (see *Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891 (1972)), unconstitutionally "drive a witness off the stand," it cannot be said that the State of Nevada's administering anti-psychotic drugs to the defendant in order to maintain his competence has the same effect. In the case at bar, the Petitioner actively participated at his trial, testifying at length and in detail about the events surrounding the murder of Paul Wade (ff. 707-742). The Petitioner was not prevented from presenting any material evidence or any other aspect of his defense as were the petitioners in *Rock*, *Webb*, and *Brooks*, et. al.

However, assuming arguendo, the right not to be medicated over objection at trial is encompassed in the Fourteenth and Sixth Amendment right to present a defense, this Court has acknowledged that a criminal defendant's due process right to present evidence is not absolute and must, at times, give way to countervailing interests, see e.g., *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499 (1948), *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), and that a criminal defendant's Sixth Amendment right to present testimony is not absolute and may be outweighed by opposing interests of the trial process. *Rock v. Arkansas, supra*. In *Rock*, Justice Blackmun held:

> The right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."

Id. at 55, S.Ct. at 2711, citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038 (1973). Long ago, this Court established, for example, that the interest in conducting an orderly court justifies the immediate punishment of courtroom disturbances, without hearing and without affording the offender the opportunity to present a defense. *In re Terry*, 128 U.S. 289, 9 S.Ct. 77 (1888). In *Chambers, supra*, this Court held:

> In the exercise of . . . [his right to present witnesses in his own defense], the accused, as is required by the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Id. at 302, S.Ct. at 1049. Rendering Petitioner competent for trial is clearly a compelling justification for the infringement, if any, of Petitioner's right to present a defense. Petitioner's allegation that no compelling state interest justifies the infringement of his fundamental rights is thus meritless, a position recognized by Amicus American Psychiatric Association at pp. 18-20 of its brief on behalf of Petitioner.

Furthermore, Petitioner's contention, that being prevented from presenting his "true demeanor" at trial deprived him of the right to present a defense, rests on an assumption that a defendant's courtroom demeanor is always probative of his mental state at the time of the offense – an assumption for which there is a significant degree of legal and scientific dispute. The probative value of courtroom demeanor has been considered by a number of state courts (see e.g. *People v. Hardesty*, 362 N.W.2d 787 (Mich. App. 1984), Appeal to United States Supreme Court denied 477 U.S. 902, 106 S.Ct. 3269 (1986); *State v.*

Hayes, 118 N.H. 458, 389 A.2d 1379 (1978); *Commonwealth v. Lourraine*, 390 Mass. 28, 453 N.E.2d 437 (1983); *In re Pray*, 133 Vt. 253, 336 A.2d 174 (1975); *State v. Maryott*, 6 Wash. App. 96, 492 P.2d 239 (1971)). Several of these courts, however, have held that the connection between the defendant's courtroom demeanor and his mental state at trial must not be overly attenuated. *Hardesty, supra*, at 797. In *Hardesty*, the Court of Appeals of Michigan held:

> A defendant's demeanor on the witness stand is probative of the issue of sanity only to the extent that the defendant's mental state at trial approximates his mental state at the time of the offense.

Id. In *State v. Hayes, supra*, the New Hampshire Court held:

> The defendant would not be entitled to have the jury view him in a state as free from the effects of medication as he would be after seven days, unless there is evidence that he was in such a state at the time of the crime.

Id. at 389.

In the case at bar, nearly one year had elapsed between the occurrence of the crime and the trial. There was evidence presented at the evidentiary hearing that Defendant was under the influence of cocaine at the time he committed the crime (f. 427). There is thus no support for the assertion that Defendant's demeanor at trial had any probative value towards proving his mental state at the time of the crime.

The American Psychiatric Association, in its Amicus Curiae Brief on behalf of Petitioner, states:

> . . . The actual evidentiary significance of demeanor in persuading the jury of the defendant's insanity at the time of a crime is not particularly strong. An individual's psychotic state may not be evidenced in his or her appearance or demeanor.

Id. at 16.

Amicus, in its brief for Petitioner, points out that the passage of time, the formal courtroom setting and the structured prison environment all may alter Petitioner's behavior between the time of the offense and trial (p. 17). In light of this, they conclude:

> The contention that [Petitioner's liberty interest in appearing before the jury as he appeared at the time of the crime] is so weighty as to alter the constitutional balance is untenable.

(p. 16). A more reliable means by which a criminal defendant may indicate his state of mind at the time of the offense, Amicus states, other than trying to "appear psychotic," is by presenting expert psychiatric and other testimony at trial (p. 17). This, of course, is precisely how the trial was conducted. Dr. Edward Quass testified that although he could not form an opinion as to David Riggins' mental state prior to his examination of the defendant, sometime between November of 1987 and January of 1988, (the murder was committed on or about November 20, 1987), he was rational and coherent at the time, with a hint of paranoia (ff. 781-782). He diagnosed him as having probable paranoid disorder (f. 785). Dr. Quass testified that in all the times he saw Riggins, his behavior

was consistent with someone who knew right from wrong (f. 788).

Several witnesses were called to testify as to Riggins' actual appearance on the night of the offense and the day after. Lowell Pendrey, David Riggins' roommate at the time of the crime, drove Mr. Riggins to the victim's house on the night of the murder (f. 586). He testified that after dropping Mr. Riggins off at the victim's house, he waited for approximately thirty minutes for Petitioner to return (f. 588), at which point, he testifies, "[Riggins] opened the door, sat down, and I believe that he had a beer in his hand and he started talking. Nothing out of the ordinary." (f. 589). Pendrey further testified that on Saturday, November 21st, 1987, Riggins appeared sick and nervous: "He just wasn't his normal self." (f. 592).

Mr. Mark Austin, the brother of another of Riggins' roommates, testified as to the following exchange with Riggins on the morning after the murder:

> A . . . He came out of his bedroom and I asked him how he was doing –
>
> Q Okay, who is he?
>
> A Dave.
>
> Q Okay.
>
> A And he said fine, and he'd been hiding from the police. And I asked him why. And he said that he was a murder suspect. And I asked him if he did it and he said no. And he produced a newspaper article showing the whole thing in detail.

(f. 649). Austin described Riggins as a little nervous and "kind of proud of the article." (f. 650). He denied that

Riggins was acting strange, but indicated that he appeared nervous and exhibited some light shaking (f. 654).

Mr. Samual Griffin, an inmate at the Clark County Detention Center on November 22nd, 1987, the day Riggins was brought in, testified to his impressions of Riggins at the time. He testified that Riggins admitted committing the murder and robbing the victim (f. 604). He testified that Riggins stated that his victim had AIDS and was spreading his infected blood on cocaine he sold (f. 603). He stated that Riggins seemed weird (f. 607).

It is obvious that the jury heard a substantial amount of testimony regarding Riggins' mental state at the time of the crime, which they were able to evaluate and use in their determination of whether Petitioner met his burden of proof with regard to his plea of insanity. Obviously, the jury, in weighing the evidence, found that the testimony did not support the contention that Riggins was legally insane at the time of the offense. There is no indication that Riggins' demeanor at trial would have been more probative of his mental state at the time of the offense than was the evidence presented by witnesses.

As Amicus APA points out, "demeanor evidence" of a schizophrenic individual is fraught with practical problems (p. 17). An unmedicated defendant suffering from a schizophrenic disorder, even if competent at the commencement of trial, could regress into incompetence and disrupt the proceeding indefinitely. The trial court would be burdened with the obligation of ensuring the defendant's competence on a daily basis and with the potentially difficult task of recognizing a relapse should it

occur. Given that the alternative, presenting testimonial evidence of his demeanor at the time of the trial, has none of these attendant practical problems *and* is more reliable than "demeanor evidence," the State is clearly justified in its infringement on Riggins' right, if such a right exists, to present demeanor evidence.

Furthermore, other cases cited by Petitioner in support of his right to present his unmedicated demeanor at trial are readily distinguishable from the case at bar. In *In re Pray, supra*, the defendant was administered medication without being fully informed of the effects of the medication, and subsequently was unable to present to the jury evidence of his medicated state. In the case at bar, several expert psychiatric witnesses testified about the affects of Mellaril on Defendant's demeanor. In *State v. Maryott, supra*; and *Ake v. State, supra*, the defendants actually argued that the anti-psychotic drugs rendered them incompetent. No such argument has been put forth in the instant case.

B. Compelled Medication Did Not Infringe On Riggins' Fifth Amendment Right Against Self-Incrimination.

Petitioner argues that medicating him over his objection violated his Fifth Amendment rights in two ways: first, by making it easier for the State to rebut the evidence proffered by the defendant with regard to his sanity, thus undermining the requirement that the State "shoulder the entire load"; second, by forcing the defendant to, in essence, testify against himself by compelling him to appear unremorseful, apathetic and sane.

It is axiomatic that in a criminal trial, a defendant is innocent until proven guilty and the State must prove beyond a reasonable doubt every element of the crime charged. See e.g. *Taylor v. Kentucky*, 436 U.S. 478, 98 S.Ct. 1930 (1978); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). However, where a murder defendant pleads not guilty by reason of insanity, the defendant bears the burden of proving to the jury, by a preponderance of the evidence, that he was insane at the time of the offense. Petitioner's allegation, that the State lessens its own burden by increasing the burden of Petitioner's affirmative defense, fails for several reasons. First, the requirement that the State prove every element of the crime, or "shoulder the entire load" is not found in the Fifth Amendment. Second, the decision to continue the medication did not preempt the defendant from presenting evidence of his insanity at trial, it simply restricted the type of evidence to testimonial evidence, evidence which is indeed much more probative of Defendant's mental state at the time of the offense. Petitioner was afforded every opportunity to present evidence of his insanity at trial through his own testimony and the testimony of his expert, Dr. Jurasky. It is clear that Petitioner simply failed to meet his burden of proof with respect to his affirmative offense of insanity. The prosecution did not rebut this defense by preempting the presentation of demeanor evidence, they did so by presenting considerably more reliable and relevant *testimonial* evidence of David Riggins' demeanor at the time of the offense.

Petitioner's allegation that the State violated his Fifth Amendment right against self-incrimination by forcing

him to be "an instrument of his own conviction" is equally meritless. The Fifth Amendment protection against self-incrimination applies only to testimonial or communicative evidence. *Pennsylvania v. Muniz*, ___ U.S. ___, 110 S.Ct. 2638 (1990); *United States v. Kasmir*, 425 U.S. 391, 96 S.Ct. 1569 (1976); *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967). In *Muniz, supra*, this Court held that the "slurring of speech and other evidence of lack of muscular coordination" revealed in a police station sobriety test did not constitute testimonial or communicative evidence for the purpose of the Fifth Amendment privilege against self-incrimination. S.Ct. at 2645. The *Muniz* Court cited Justice Holmes, who wrote in *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2 (1910):

> The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.

Id. at 252-253, S.Ct. at 6. In the case at bar, Petitioner claims that his physical demeanor is testimonial or communicative evidence for the purpose of Fifth Amendment protection. Those aspects of Petitioner's behavior which he claims are affected by the medication, his "physical appearance and natural demeanor," are clearly aspects of his "body" and are not protected by the Fifth Amendment privilege against self-incrimination. Thus, even were there any evidence that Petitioner's demeanor was affected by the medication, and even were Petitioner's courtroom demeanor considered probative evidence in assessing the defendant's sanity at the time of the offense,

his demeanor is not testimonial or communicative evidence and is not protected by the Fifth Amendment.

C. The Power To Waive The Right Not To Be Tried While Incompetent Does Not Give Riggins The Right To Demand The Opposite Of That Right.

Petitioner alleges that because a criminal defendant may waive certain constitutional rights, as long as that waiver is made knowingly and intelligently and with adequate awareness of its consequences, he has the right to waive his right to not be tried while incompetent. In Nevada, competency is jurisdictional, and it is clear that a criminal defendant cannot, in fact, waive his right not to be tried while incompetent. Nevada Revised Statute (NRS) 178.400(1) reads: "A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." NRS 178.405 reads, in relevant part, "[I]f doubt arises as to the competence of the defendant, the court *shall suspend the trial* . . . until the question of competence is determined." [emphasis supplied]. (See also, *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975); *Dogget v. Warden*, 93 Nev. 591, 572 P.2d 207 (1977); and *Melchor – Gloria v. State*, 660 P.2d 109 (Nev. 1983). None of the cases cited in Petitioner's brief, i.e. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Faretta v. California*, 422 U.S. 806 (1975); *Taylor v. United States*, 414 U.S. 17 (1973), concern rights necessary for jurisdiction. While a court may obtain a waiver of a defendant's privilege against self-incrimination, (*Miranda, supra*), of a defendant's right to counsel, (*Faretta, supra*), or of his right to be present at trial, (*Taylor, supra*), a Nevada court does not have jurisdiction over an incompetent and thus cannot try him

under any circumstances, whether or not a knowing and intelligent waiver was obtained.[2] Defense counsel, furthermore, conceded at the evidentiary hearing on the motion to terminate medication that competency is jurisdictional and can not be waived (f. 425).

Assuming, arguendo, that a criminal defendant has the *power* to waive his right not to be tried while incompetent, this does not grant him the *right* to waive that right. *Singer v. United States*, 380 U.S. 24, 34, 85 S.Ct. 783, 790 (1965). In *Singer*, this Court has held that the power to waive a constitutional right does not carry with it the right to insist upon the opposite of that right:

> [A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, . . . although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, . . . and although he can waive his right to be confronted by witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation.

Id. at 35, S.Ct. at 790. (citations omitted). In *Singer*, the majority held that a criminal defendant does not have the right to demand a bench trial simply by virtue of his right to waive a jury trial. *Id.* at 35, 36, S.Ct. at 790. By the same

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[2] For other state decisions holding that an incompetent cannot be subject to criminal proceedings, see *People v. Marks*, 756 P.2d 260, 248 Cal. Rptr. 874 (1988); *Miller v. State*, 751 P.2d 733 (Okl. Cr. 1988).

token, even assuming a defendant may, under some circumstances, waive his constitutional right not to be tried while incompetent, that ability does not grant him the right to insist on being tried while incompetent. The *Singer* Court stressed the importance of a jury trial in the framework of a criminal defendant's right to a fair trial:

> In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process.

Id. at 36, S.Ct. at 790. Similarly, it is difficult to understand how Petitioner can argue that a state law designed to ensure his right to be tried while competent violates any aspect of Petitioner's right to a fair trial.

D. There Is No Requirement That The Trial Court Make Factual Findings In The Record.

Although the State recognizes the importance of adequate procedural safeguards in determining whether medication over Petitioner's objection is warranted, Nevada has no requirement that the trial court make a written finding of fact with regard to its denial of a motion to terminate medication. Petitioner cites Federal Rule of Civil Procedure 52(a) as "generally requiring" a finding of fact. However, that same rule provides:

> Findings of fact and conclusions of law are unnecessary on decisions of motions under

Rules 12 or 56 or any other motion except as provided in Rule 41(b).[3]

Fed. R. Civ. P. 52(a). See e.g. *Thomas v. Peyser*, 118 F.2d 369 (App. D.C. 1941); *Schad v. Twentieth Century-Fox Corp.*, 136 F.2d 941 (C.L.A. 3, 1943); *Prudential Ins. Co. of America v. Goldstein*, 43 F.Supp. 767 (N.Y. 1942); *Somers Coal Co. v. United States*, 2 F.R.D. 532, 6 Fed. Rules Serv. 52(a), Case 1 (Ohio 1942). The reliance on Rule 52(a) is wholly misplaced since the rules do not apply to Nevada criminal procedure and since, even if they did, Rule 52(a) does not require a finding of fact on decisions of most motions.

Furthermore, despite Petitioner's allegations, the record shows that the trial court went to considerable effort to determine the necessity of continued medication. (See Argument I, above). The court's reasoning, in deciding to continue the medication, is self evident in light of the testimony produced at the evidentiary hearing. The trial court judge was legitimately concerned with the possibility of court delay should Petitioner regress to incompetence shortly before or during trial (see f. 419), and was legitimately concerned that in his unmedicated state, Petitioner might "act on his hallucinations" and carry out his suicidal threats (f. 451). Petitioner's and the American Psychiatric Association's assertion (as Amicus) that the record cannot compel a finding of need to be medicated is thus without merit. The record shows the factual basis upon which the trial court judge made his decision. Although the American Psychiatric Association

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[3] Rule 41(b) refers to involuntary dismissal of an action and is thus not relevant to the issue on appeal.

has arrived at a different medical conclusion as to the Defendant's medicative needs, the trial court judge could have reasonably concluded that the medication was necessary based on the testimony he heard from psychiatrists who actually examined Riggins.

III

THE PETITIONER'S EIGHTH AMENDMENT ALLEGATION IS BARRED FROM CONSIDERATION BY THIS COURT FOR FAILURE TO PRESENT SAID CLAIM TO THE STATE COURTS OF NEVADA AND TO THIS COURT IN HIS PETITION FOR WRIT OF CERTIORARI

Petitioner alleges that being medicated over his objection unfairly prejudiced him in his effort to persuade the jury not to impose the Death Penalty in violation of the Eighth Amendment. However, Petitioner failed to raise this argument either in his direct appeal to the Supreme Court of Nevada or in his Petition for Writ of Certiorari. In light of this, the Eighth Amendment argument is not properly presented for review and is barred from consideration by this Court. Sup. Ct. Rule 24.1(a). See e.g. *Neely v. Martin K. EBY Construction*, 386 U.S. 317, 87 S.Ct. 1072 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555 (1964); *California v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037 (1957).

Assuming, arguendo, that this issue is within this Court's jurisdiction to decide, there is nonetheless no Eighth Amendment violation. A jury must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense." *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Arguably, evidence of Defendant's mental illness, though not sufficient to prove Defendant was insane at the time of the offense, may serve as mitigating evidence at the penalty phase. Petitioner's allegations, however, fail for several reasons. First, Petitioner was not prevented from presenting evidence of his mental state at the time of the offense, and the state interest is rendering him competent for trial outweighed his interest in presenting the arguably relevant evidence of his demeanor at the time of trial. (See Arguments I and II, above). Unlike the cases cited by Petitioner, e.g. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987), the jury in the case at bar was not precluded from considering mitigating evidence, they were merely restricted as to the form of the evidence they saw. As stated in Argument I, above, the compelling evidence in rendering Riggins competent for trial justified this restriction.

Second, Petitioner, in asking the sentencer to consider whether he was mentally ill, is asking the jury to reconsider the issue of Defendant's guilt. This Court held, in *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320 (1988). that juries need not revisit the issue of defendant's guilt or innocence:

> Our edict that in a capital case 'the sentencer cannot be precluded from considering, as a mitigating factor, any aspect of defendant's character or record or any circumstance of the offense . . . ' in no way mandates reconsideration, by capital juries, in the sentencing phase, of their 'residual doubts' over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's 'character,' 'record' or a 'circumstance of the offense.'

S.Ct. at 2327 [citations omitted].

In seeking to re-raise the issue of Defendant's sanity at the penalty phase, Petitioner is obviously trying to make this jury reconsider their residual doubts over a key element of Defendant's guilt or innocence for the crime – his sanity.

Third, as discussed in Argument II of this brief, there is nothing on the record that indicates that Riggins' demeanor was affected in any way by the medication. There is no evidence as to why Riggins chose not to read his statement to the jury and instead had defense counsel read the statement. It is pure speculation to assert that the medication made him unable to read it.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

December, 1991.

Respectfully submitted,

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Counsel gratefully acknowledges the substantial assistance of Gerald Gardner, law clerk, in the preparation of this brief.

FOR ARGUMENT

No. 90-8466

In The

Supreme Court of the United States

October Term, 1991

DAVID E. RIGGINS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

On Writ Of Certiorari To The

Supreme Court Of The State Of Nevada

REPLY BRIEF FOR PETITIONER

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Only two points in the Brief for Respondent ("Resp. Br.") and the Brief Amicus Curiae of the State of Louisiana Supporting Respondent call for supplementation of the Brief for Petitioner.

I.

THE FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC DRUGS TO RIGGINS DURING HIS TRIAL VIOLATED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Despite the suggestions of respondent and its amicus, this case is not about whether a state may ever "treat incompetent defendants with antipsychotic medication in order to achieve and maintain competency to stand trial." Brief Amicus Curiae of the State of Louisiana Supporting Respondent at 1; see Resp. Br. at 14-15. The issue is far narrower: it is whether a state may forcibly medicate a competent defendant on the claim that the medication is necessary to maintain the defendant's competency to stand trial (1) when there is virtually no evidence that the defendant would become incompetent without the medication and (2) when the defendant's unmedicated demeanor is material evidence -- indeed, perhaps the best evidence he has -- in support of his only defense -- that he was insane at the time of the crime. This case raises also the related question whether a state may forcibly medicate a competent defendant during the sentencing phase of a capital case on

the ground that it is necessary to maintain the defendant's competency, (1) when there is virtually no evidence that the defendant would become incompetent without the medication and (2) when the primary mitigating factors he seeks to demonstrate are that he suffers from a severe mental illness and feels grief and remorse for his actions.

Courts have universally recognized that the defendant's courtroom demeanor has probative value when sanity is at issue. See, e.g., Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437, 442 (1983); State v. Hayes, 118 N.H. 458, 389 A.2d 1379, 1381-82 (1978); In re Pray, 133 Vt. 253, 336 A.2d 174, 176-77 (1975); see also 4 Wigmore on Evidence § 1160 (rev. ed. 1972). Even the Nevada Supreme Court acknowledged this. (J.A. 54). And when a defendant who has asserted the insanity defense takes the witness stand, as Riggins did, his demeanor is not only relevant to the credibility of his testimony, it is a material portion of his testimony.

Respondent itself recognizes that antipsychotic drugs "suppress a person emotionally," and "render[ ] a person rational . . . and logical." (Resp. Br. at 17); they make a mentally disturbed person appear calm, impassive, and sane. Forcibly medicating an insanity defendant with antipsychotic drugs, therefore, violates his right to present his defense. See Rock v. Arkansas, 483 U.S. 44, 52 (1987)

Respondent contends that Riggins' right to present a defense was not infringed because "several expert psychiatric witnesses testified about the effects of Mellaril on Defendant's demeanor." Resp. Br. at 28. But, as Justice Springer of the Nevada Supreme Court recognized in his dissent, such testimony does not "approach the insight a jury is afforded by the opportunity to see and hear the defendant, as is." (J.A. 67 (emphasis in original)); accord Commonwealth v. Louraine, 453 N.E.2d at 442; see also Brief Amicus Curiae of the Coalition for the Fundamental Rights of Equality of Ex-Patients at 26. Moreover, Riggins and his attorney had the right to decide how best to present Riggins' defense. The compelled medication unconstitutionally interfered with their decision that presenting an unmedicated Riggins to the jury was the best way to support Riggins' insanity defense and the best way to defend against the imposition of the death penalty. See Geders v. United States, 425 U.S. 80 (1976); Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961).

As the American Psychiatric Association notes in its brief amicus curiae, antipsychotic drugs can also make a defendant look "so calm or sedated as to appear bored, cold, unfeeling, and unresponsive." Brief Amicus Curiae of the APA at 13. Thus, forced medication also violates an

insanity defendant's Fifth Amendment right not to be compelled to be a witness against himself as well as his right to a fair trial. See Pet. Br. 16-18.

II.

THERE WAS VIRTUALLY NO EVIDENCE THAT RIGGINS WOULD HAVE BECOME INCOMPETENT WITHOUT MEDICATION

What is especially striking in this case is that the only interest advanced by respondent to justify medicating Riggins was the need to maintain Riggins' competency to stand trial,[1/] yet scarcely any evidence

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1/ At the hearing on Riggins' motion to terminate the medication, respondent's only justification for continuing the medication was "that medication in this case is required in order to continue the defendant's competency." (R. 497). This also was the only interest advanced by respondent in its brief in opposition to Riggins' motion to terminate medication (J.A. 26-40), in its brief to the Nevada Supreme Court and in its opposition to Riggins' Petition for Writ of Certiorari.

For the reasons stated in Brief for Petitioner at 20-21, respondent's concern that an unmedicated Riggins might "fake a psychosis" (R. 498-99) was an insubstantial interest, as was respondent's concern that delay might result if Riggins did become incompetent without medication (R. 499). At the time of the hearing trial was more than ten weeks away (see Resp. Br. at 19-20), but, because the trial court granted a continuance (see Resp. Br. at 20) due to a scheduling conflict of petitioner's attorney, the trial did not actually begin until more than sixteen weeks after the hearing. It probably would have taken less than ten weeks to see if Riggins became incompetent without medication and, if he did, to restore his competency. (R. 417-19, 485).

(continued...)

suggested that Riggins would have become incompetent without medication. As respondent acknowledges (Resp. Br. at 5-10), none of the three psychiatrists who testified at the hearing on Riggins' motion to terminate the administration of medication ever found Riggins to be incompetent, and none believed that ceasing the medication would likely or probably cause Riggins to become incompetent. To the contrary, Dr. Quass testified that Riggins would be competent without medication. (R. 443). Dr. Master testified that, while there was a "possibility" that Riggins would become incompetent without the medication, there was no real likelihood of this happening. (R. 414-15). And Dr. O'Gorman was unable to render an opinion whether Riggins would become incompetent without medication (R. 485).

A fourth psychiatrist, Dr. Jack A. Jurasky, had evaluated Riggins for competency but did not testify at the hearing on Riggins' motion. Although the trial court's order denying Riggins' motion (J.A. 49) does not indicate whether the judge even considered the reports prepared by

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4/(...continued)
In the Brief for Respondent, respondent, for the first time, asserts that "the well-being of the Petitioner and the safety of others was [also] of concern to the court." Resp. Br. at 19. This argument is disingenuous. Not only has respondent never before asserted this interest but, as the APA observes, the record "can hardly compel a finding that the medication was necessary to serve the State's (unasserted) treatment and institutional interests." Brief Amicus Curiae of the APA at 22 (parenthesis in original).

Dr. Jurasky (J.A. 11-12, 18-19), these reports do not suggest that medication was necessary to maintain Riggins' competency to stand trial. Dr. Jurasky did not believe that Riggins would become incompetent without medication, he believed Riggins was incompetent even while receiving medication. Id.

Accordingly, even if a State's interest in ensuring a defendant's competency to stand trial outweighs the Fifth, Sixth, Eighth and Fourteenth Amendment rights that petitioner submits are infringed by the forced medication of an insanity defendant, respondent failed to show that forcing Riggins to ingest any antipsychotic drugs during his trial -- let alone the heavy dosage of 800 milligrams of Mellaril per day (see R. 415, 473, 752) -- was necessary to maintain Riggins' competency.

CONCLUSION

The judgment of the Supreme Court of Nevada should be reversed and the case remanded for further proceedings.

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No. 90-8466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID E. RIGGINS,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEVADA SUPREME COURT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus, Nevada Attorneys for Criminal Justice, is a non-profit, voluntary association of those individuals, mainly criminal defense attorneys, who have an interest in the fair administration of justice in the country in general, and Nevada in particular. Amicus has approximately 150 members. Amicus presents this brief in support of the Petitiner for the Court's consideration.

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ISSUE PRESENTED

Amicus submits that the narrow issue presented by the Writ herein, apparently one of first impression for this Court, is whether the Petitioner was denied his rights under the due process clause of the Fifth Amendment and the right to a fair trial under the Sixth Amendment by forced medication during trial which prevented Petitioner from allowing the jury to view the Petitioner's true mental state.

The question is whether the Petitioner was unconstitutionally prevented from presenting evidence particularly relevant to his insanity defense- his own mental condition in its unaltered state.

ARGUMENT

There would seem to be no principle more basic, no consideration more paramount, then a criminal defendant's right to present a defense unfettered by unnecessary interference by the State. Here, all the Petitioner requested was that he be left undrugged by the State so that he could best present his only available defense- his own insanity at the time of the crime. It was the Petitioner's belief, aided by counsel, that the best presentation of his defense was the jury's ability to view his mental condition unmasked by 800 milligrams per day of Melliril, the maximum recommended daily dosage of that psychotropic drug.

The State, without any showing of need, in fact without any need whatsoever, deprived the Petitioner of his rights to present his insanity defense in the manner thought best by the Petitioner and his counsel. As such, the Petitioner's right to a fair trial, to present a defense, and to follow the advice of his counsel, were denied.

Amicus asserts that a criminal defendant has at least the right to refuse psychotropic drugging during the limited period during which the defendant is actually being tried before a jury. Amicus proposes that the proper course is for the trial court to determine whether a defendant has made an informed choice to forego medication during trial. If the trial court determines that such an informed choice has been made, then the defendant will be allowed to avoid the effects of medication during the trial period. If competency is

threatened by the avoidance of medication, the defendant will be considered to have waived his right to be tried while fully competent. The defendant will have traded that right for the ability to present his or her insanity defense.

Under this process, there is no State interest threatened. Trial will not be delayed or avoided because of the defendant's choice to proceed unmedicated. And the defendant's right to present a defense will be retained.

I. A CAPITAL DEFENDANT HAS A FUNDAMENTAL CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN BOTH THE GUILT AND PENALTY PHASES OF THE TRIAL UNFETTERED BY ARBITRARY STATE ACTION.

This Court has consistently respected and enforced a criminal defendant's right to have a fair opportunity to present a defense on his own behalf. The Court emphasized the right to present a defense in Washington v. State of Texas, 388 U.S. 14, 18-19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

> This Court had occasion in In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 91 L.Ed.2d 682 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:
>
> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense- a

> right to his day in court- are basic in our system of jurisdiction; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Citations omitted)

This Court plainly stated in Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973) that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[1]

> We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. ... Rather, we hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial. Id.

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[1]Chief Justice Rehnquist's concern regarding "constitutionalization of the intricacies of the common law of evidence" Chambers, supra, 410 U.S. 308, 93 S.Ct. 1052 (Rehnquist, J. dissenting) is not implicated under the facts at bar. Fundamental constitutional due process concerns, not rules of evidence, are impacted by the State's actions here.

A full and fair presentation of evidence is particularly critical in a capital case where the defendant's life hangs in the balance. This Court has repeatedly underscored the principle that a capital defendant has the right to present **any** evidence in mitigation during the penalty phase of the case.

> There is no disputing that this Court's decision in Eddings requires that in capital cases "'the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" (Emphasis in original) Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1, 6 (1986).

The State simply cannot preclude the capital defendant from presenting relevant evidence either as to his guilt or the appropriateness of the death sentence. In the analogous case of Ford v. Wainwright, 477 U.S. 399, 106 S.ct. 2595, 91 L.Ed.2d 335 (1986), this Court reversed and remanded a capital case where the Court found that the State's procedures for determining the sanity of the capital defendant were not sufficient to satisfy constitutional considerations.

> The first deficiency in Florida's procedure lies in its failure to include the prisoner

in the truth-seeking process. Notwithstanding this Court's longstanding pronouncement that "[t]he fundamental requirement of due process of law is the opportunity to be heard," ... state practice does not permit any material relevant to the ultimate decision to be submitted on behalf of the prisoner facing execution. In all other proceedings leading to the execution of an accused, we have said that the factfinder must "have before it all possible relevant information about the individual defendant whose fate it must determine." (Citations omitted) Id., 447 U.S. 413, 106 S.Ct. 2604.

In Ford, the capital defendant's fundamental rights were abridged by the State's refusal to allow evidence to be presented during the determination of the defendant's post-trial sanity. Here, the State prevented the Petitioner from presenting his own demeanor and mental condition during the guilt and penalty phases of his capital trial. Amicus asserts that this action violated the Petitioner's right to present a defense.

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II. FORCED MEDICATION WITH PSYCHOTROPIC DRUGS DURING TRIAL DENIES A CRIMINAL DEFENDANT WHO IS PROFFERING AN INSANITY DEFENSE THE RIGHT TO PRESENT CRITICAL EVIDENCE ON HIS BEHALF.

This Court has held in a variety of circumstances that in determining "whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" Youngberg v. Romeo, 457 U.S. 307, 320, 102 S.Ct. 2452, 2460, 73 L.Ed.2d 28 (1982); *see also* Jackson v. Indiana, 406 U.S. 715, 728, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972). Amicus asserts that the State has no compelling interest, in fact no rational interest, in denying a capital defendant the right to present critical insanity evidence at the guilt and penalty phases of his trial. The defendant's interest, on the other hand, is evident. It is the hope that he will not be killed by the State.

The precise issue presented here was addressed in a thoughtful law review article published in Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U.Miami L.Rev. 1109 (1986).[2]

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[2]Since the author of the Article has stated Amicus' position far better than Amicus can, we adopt whole clothe many of the principles expressed in that article.

In a small but significant group of cases such as this one, the defendant's constitutional right not to incriminate himself, to present a defense to a criminal charge, and to privacy are on an apparent collision course with the constitutional prohibition against the trial of incompetent defendants. Where the defendant is a mentally ill individual who may only be restored to competency through the use of psychotropic drugs, the very fact of this pharmaceutical restoration may significantly undercut his primary defense- that he was insane at the time of the offense. The defendant's "synthetic sanity," achieved through the taking of antipsychotics or other psychoactive drugs, precludes the jury from seeing the defendant as he was at the time of the crime, the moment for which the jury's assessment of his mental state is critical. Id. at 1111.

The Fentiman article concluded, *inter alia*, that the forced medication of a defendant who is attempting to present an insanity defense violates the defendant's Due Process right to present a defense.

> The result of the compelled administration of antipsychotic drugs, with its elimination of overt symptoms of serious mental illness and the concomitant

> presence of misleading and distracting side effects, is that the jury is presented with a totally false picture of the defendant's mental processes. The use of psychotropic drugs precludes the jury from catching even a glimpse of the defendant's true mental state. Id. at 1130.

As recognized in the Fentiman article, forced medication deprives the defendant of the best evidence available to prove his defense- his own mental condition. And, as argued below, the defendant is deprived of this evidence without need- compelling or otherwise. If appropriate procedures are followed, the defendant can be allowed to properly present a defense and the State will be allowed to proceed with the desired prosecution.

A number of State courts have addressed the issue presented here. The cases are divided into those that have found the defendant's right to present his mental demeanor at trial to be paramount and those who have found that the State's right to proceed with prosecution of an incompetent defendant should control. While Amicus asserts, as set forth below, that this is an illusionary conflict, the cases are instructive on the debate that has occurred in the States that have addressed the issue.

The cases that have denied the defendant a right to be tried in an unmedicated state have found the State's interest in proceeding with trial is the paramount concern. In State v. Law, 244 S.E.2d 302, 307 (SC 1978), the South

Carolina Supreme Court held that the State's right to trial outweighed the defendant's claimed absolute right to "bodily integrity". The court held that "[i]t is our view that such an absolute right does not exist. It is our view that medication may be administered without the consent of a defendant under compelling circumstances, including those where medication is necessary to render a defendant competent to stand trial." Id. at 307. The basis for the court's holding was its concern that an incompetent defendant could not be tried and that the State's interest in proceeding with trial constituted a compelling reason for the forced medication.

Similarly, the court in People v. Hardesty, 362 N.W.2d 787 (Mich.App.1984) also found that the State's interest in proceeding with prosecution outweighed the defendant's interest in avoiding forced medication.

> In our case the medication allowed the state to bring defendant to trial so that his culpability and criminal responsibility could be adjudicated. Additionally, the record clearly demonstrates that the drugs used enhanced, rather than diminished, defendant's ability to engage in rational thought and assist counsel at trial. This being the case, the balance of competing interests favors the state .... Id. at 793.

In State v. Jojola, 553 P.2d 1296 (CA NM 1976), forced medication was upheld on

two grounds. First, the court found that there was no evidence that the "defendant's thought processes or the contents of defendant's thoughts were affected by the Thorazine ...". Id. at 1299. Secondly, the court found that the argument that the defendant' Due Process rights were violated by depriving him of the right to demonstrate his unmedicated demeanor was not supported by the record. The court found that the theory originally raised by the defendant that would have made relevant his demeanor was not pursued at trial. Id.

Finally, the court in State v. Lover, 707 P.2d 1351 (Wash.App. 1985) considered the State's right to proceed to trial to outweigh the defendant's right to refuse forced medication as long as the effect of the medication could be explained to the jury.

> The compelling interest here, as in *Law* and *Jojola*, is the State's interest in bringing an accused to trial, an interest the *Maryott* court recognized as "fundamental to a scheme of ordered liberty." ... No less intrusive method of achieving this goal has been suggested by the defendant. Id. at 1354.

The common principle highlighted in the above cases that have approved the forced medication of the defendant is that the State's interest in proceeding with the prosecution of a criminal defendant outweighs the defendant's right to refuse psychotropic drugs, at least where no alternative procedure, short of avoiding

trial, has been suggested.

The cases where forced medication has been disapproved have focused on the prejudicial effect to the defendant's ability to present the jury with his or her true unmedicated demeanor. The court in State v. Murphy, 355 P.2d 323 (Wash. 1960)(*En Banc*) held that the defendant in a capital case was entitled to a new trial where the forced medication altered the defendant's demeanor at trial.

> Yet, as a practical, common-sense matter, it can hardly be denied that in a case such as this, where the defendant appears and admits committing the criminal acts charged, constituting first degree murder, a significant consideration in the minds of the members of the jury respecting the penalty to be imposed may well be their evaluation of defendant's attitude in regard to the crime he has committed. Id. at 326.

Similarly, the court in State v. Maryott, 492 P.2d 239 (CA1 Wash. 1971) found that the defendant had an interest in presenting his demeanor as evidence at trial and that the State had no counter-balancing interest.

> When mental competence is at issue, the right to offer testimony involves more than mere verbalization. The demeanor in court of one who has raised the issue of his sanity is of

probative value to the trier of fact. ...

> In the instant case, it is difficult to see a legitimate state interest in imposing drugs on a defendant who asks to be free of them. If the motive is to control a possibly obstreperous defendant, two conclusions are suggested, analogously, by the reasoning in *Allen*. First, no control should be imposed until its need has been demonstrated. Second, the control which is imposed should insure an orderly trial with the least interference with a defendant's rights. Id. at 242, 243.

In In re Pray, 336 A.2d 174 (Vermont 1975), the defendant's murder conviction was reversed based upon the fact that the jury had not been informed that the defendant was under heavy medication at trial. The Vermont Supreme Court recognized the importance of the defendant's demeanor during trial.

> The more serious question, in the situation of this case, is the impact of a heavily sedated defendant upon the jury's evaluation. ...
>
> In other words, the jury never looked upon an unaltered, undruged Gary Pray at any time during the trial. Yet his deportment, demeanor, and day-to-

> day behavior during that trial, before their eyes, was a part of the basis of their judgment with respect to the kind of person he really was, and the justiciability of his defense of insanity. Id. at 177.

Certainly, a case where the jury was not apprised of the forced medication of the defendant presents a more serious violation of due process than the case at bar. However, Amicus asserts that merely apprising the jury of the medication cannot cure the due process violation in the absence of any compelling State interest in forcing the medication upon a defendant.

The court in Com. v. Louraine, 453 N.E.2d 437 (Mass.1983) also reversed a first degree murder conviction where the defendant was forcibly medicated during trial. The court held that the defendant's demeanor was critical evidence and that the presentation of expert testimony regarding the effects of the medication would not cure the constitutional violation.

> In a case where an insanity defense is raised, the jury are likely to assess the weight of the various pieces before them with reference to the defendant's demeanor. Further, if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to

> conform his conduct to the requirements of the law. ...
>
> The ability to present expert testimony describing the effect of medication is not an adequate substitute. At best, such testimony would serve only to mitigate the unfair prejudice which may accrue to the defendant as a consequence of his controlled outward appearance. It cannot compensate for the positive value to the defendant's case of his own demeanor. Id. at 442.

The Louraine court also noted that if the State were allowed to forcibly medicate the defendant during trial, the State would thus have the ability "'to determine what the jury will see or not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant ...'" Id.

Amicus asserts that it is uncontroverted that a defendant's demeanor at trial is of critical relevance where the sanity of the defendant is in issue. Furthermore, the substitution of an expert's sterile testimony regarding what the defendant's demeanor would be, absent forced medication, cannot substitute for the jury's view of an unmedicated defendant.

> It can therefore be inferred that when an insanity defendant with a history of schizophrenia and psychotropic drug treatment appears, due to such treatment,

to be calm, in control, and capable of understanding the proceedings against him, a jury may be strongly inclined to ignore the expert witness's assessment of psychiatric impairment. Such a jury will be much more likely to find the defendant guilty, rather than acquitting him on grounds of insanity. Instead of seeing a violent, extremely disturbed individual, careening out of control because of his normal thought processes, the jury may easily perceive the defendant as a "calculating, merciless criminal," unmoved by trial testimony relating to the grotesque and terrifying conduct in which he is alleged to have engaged. Fentiman, *supra*, at 1131.

Amicus asserts that where the State's interest in proceeding to trial is protected, preventing a defendant from presenting his true unmedicated demeanor at that trial violates the Constitution and mandates reversal.

III. A DEFENDANT HAS THE RIGHT TO WAIVE HIS RIGHT TO BE COMPETENT TO STAND TRIAL IN ORDER TO PROPERLY EFFECT HIS DECISION TO PRESENT AN INSANITY DEFENSE.

Although the historical underpinnings of the prohibition against trial and punishment of a mentally incompetent defendant are somewhat vague, American

courts have uniformly recognized that principle. Ford v. Wainwright, *supra*, at 477 U.S. at 401, 408-409, 106 S.Ct. at 2597, 2601. The State should not be allowed, however, to use the defendant's constitutional shield against being tried while incompetent as a sword with which to prevent the presentation of exculpatory evidence by the defendant. Should the defendant make a valid waiver of his right not to be tried while incompetent, the only State interest then being impacted would be an interest in having a strategic advantage at trial. This is, presumably, not such an interest that will be recognized as justifying the deprivation of the defendant's right to fairly present his or her defense.

While Amicus certainly agrees with the general principle that incompetent individuals should not be subjected to criminal prosecution but should rather be provided humane medical assistance, adherence to that principle does not contraindicate exception when necessary to protect the defendant from greater a harm. The case at bar best illustrate's the reason for the exception. Here, the State of Nevada is aggressively attempting to bring about the Petitioner's death. They have succeeded in accomplishing that goal to date- the Petitioner sits on death row. In order to avoid his death, the Petitioner sought to present a defense- his insanity. The State prevented the proper presentation of that defense by forcing the Petitioner to accept each day during trial the maximum recommended dosage of a strong psychotropic drug. This was done without apparent inquiry into whether the State had any

proper interest in forcing the Petitioner to be drugged.

Certainly, the State has no recognizable interest in requiring a defendant to assert the right to be competent during trial. Should the defendant decide, with the advice of counsel, to waive that right, that trial strategy decision does not impact the State at all. Additionally, the State can hardly be heard to seriously suggest that the desire to force psychotropic medication on a defendant is done with the defendant's best medical interests in mind. Here, the State is seeking to kill the Petitioner. The Petitioner should have the right to decline any supposed humanitarian concerns for his well-being in the interim before his execution if that decision is made in order to safeguard the right to a fair trial.

Simply put, allowing a defendant to waive his right to be competent at trial avoids any conflict between the State's right to a trial and the defendant's right to present a defense. The solution suggested here has been noted in at least two of the cases that have addressed the issue, Louraine, *supra*, at 444, fn. 13, State v. Hayes, 389 A.2d 1379, 1382 (1978), as well as the commentary by Professor Fentiman.

This Court has long recognized the ability of a defendant to waive various constitutional rights implicated in criminal prosecutions. The defendant may waive the privilege against self-incrimination, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the right to

counsel, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), the right to be present at trial, Taylor v. United States, 414 U.S. 17, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973), and numerous other privileges considered to be foundational rights. Therefore, there seems to be no principled reason why the Petitioner should not have been allowed to waive his right to be competent during trial, if indeed that would have been the result of termination of medication, if that decision was made in consultation with his counsel and for the purpose of presenting his insanity defense. *See* Fentiman, *supra*, at 1157.

The process that has been suggested would protect all interests implicated in the decision to avoid forced medication. The defendant would be medicated prior to trial so as to allow the defendant to assist counsel and make a rational and informed decision to forego medication. The trial court would then, upon the defendant's request, conduct a hearing into whether the defendant's decision to terminate forced medication was knowingly and intelligently made. If the trial court determined that the decision was competently made, medication would be halted sufficiently prior to trial so as to ensure that the defendant would appear before the jury in his or her true mental state.

> Such a defendant would be acting in accordance with the essential purposes of the incompetency prohibition. He would be able to function as a defendant in terms of active and comprehending pretrial preparation, and he

> would be able to understand why he was charged and why he might be punished. He would be able to recall pertinent facts, identify potential witnesses, and discuss with his attorney alternative trial strategies. As a result, the defendant would be able to persuasively mount the best defense available to him- that he was insane at the time of the offense. Fentiman, *supra*, at 1159.

This procedure would seem to avoid all constitutional pitfalls. The defendant is able to present an adequate defense and the State is able to proceed with trial. As opposed to simply denying the defendant the right to present his or her only defense, this procedure would seem to protect the rights of all involved. Petitioner asserts that this is the procedure that should have been followed below.

IV. THE DEPRIVATION OF THE PETITIONER'S FUNDAMENTAL DUE PROCESS RIGHT TO PRESENT A DEFENSE CANNOT BE CONSIDERED HARMLESS ERROR.

The court has generally allowed resort to harmless error analysis where it can be shown beyond a reasonable doubt that the constitutional error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 830, 17 L.Ed.2d 705 (1967). The Court has allowed harmless error analysis, even in capital cases, where the error complained of was discrete in nature. Satterwhite v. Texas, 486 U.S. 249,

256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). "Some constitutional violations, however, by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Id., 486 U.S. 256, 108 S.Ct. 1797; Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 2049, 97 L.Ed.2d 622 (1987). Amicus asserts that the error at bar cannot, as a matter of law, be considered harmless error.

Deprivation of a defendant's right to present his defense, free from unnecessary interference by the State, "goes to the very integrity of the legal system." Gray, 481 U.S. at 668, 107 S.Ct. at 2049. There can be nothing more fundamental. As such, harmless error analysis should not be utilized.

V. EVEN IF THE COURT UTILIZES A HARMLESS ERROR STANDARD FOR THE DEPRIVATION OF THE FOUNDATIONAL RIGHT OF A DEFENDANT TO PRESENT A DEFENSE, IT CANNOT BE SAID THAT THE REFUSAL TO ALLOW THE DEFENDANT TO PRESENT TO THE JURY HIS OWN MENTAL STATE AS EVIDENCE IN AN INSANITY DEFENSE TRIAL IS HARMLESS ERROR.

Even if the Court does resort to the harmless error analysis in cases, such as this, where the defendant has been deprived by the State of the opportunity to present an adequate defense, Amicus asserts that such error cannot be considered harmless under the facts at bar. Even the State cases that have held that a defendant's rights were not fatally violated

through forced medication have recognized that the defendant's demeanor is relevant in an insanity defense trial.

Under Chapman, 386 U.S. at 23, 87 S.Ct. at 827-828, the State is required to prove beyond a reasonable doubt that the forced medication did not contribute to the Petitioner's conviction or the sentence of death. Petitioner asserts that such a showing is not possible in a case where the Petitioner's demeanor was so relevant and that demeanor was artificially altered by the State. It would seem a rare case indeed where the State asserts that medication of a defendant is necessary in order to make him or her competent to stand trial yet the unmedicated demeanor of the defendant would have no effect on a jury's determination of the sanity question.

V. CONCLUSION

Amicus asserts that this case does not have to involve a constitutional conflict between the Petitioner's due process right to present his defense and the State's right to prosecute. Once it is acknowledged that the Petitioner may waive his right to be competent at trial, if in fact the termination of medication will lead to incompetence, then all constitutional friction disappears.

Amicus further asserts that any error which leads to the deprivation of the Petitioner's right to present a defense is fundamental and should not be considered under the harmless error analysis. However, if the harmless error rule is applied, it cannot be said that deprivation of the

Petitioner's ability to present his unmedicated demeanor in support of his insanity defense is harmless beyond a doubt.

Amicus respectfully urges this Court to hold that a defendant has the right to waive competency at trial in order to present his or her insanity defense. Amicus further urges this Court to hold that the harmless error rule has no place when considerations of such foundational importance are involved.

Amicus urges reversal of the case at bar.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I an am employee of KEVIN M. KELLY, LTD. and that I am not a party to nor interested in the within action; on the 18 day of November, 1991, I deposited three (3) true and correct copies of the BRIEF OF AMICUS CURIAE in the United States mails, first class postage prepaid thereon, addressed to the following:

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No. 90-8466

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID E. RIGGINS,
Petitioner,

v.

STATE OF NEVADA,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF AMICUS CURIAE OF THE AMERICAN PSYCHIATRIC ASSOCIATION SUPPORTING PETITIONER

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BRIEF AMICUS CURIAE OF THE AMERICAN PSYCHIATRIC ASSOCIATION SUPPORTING PETITIONER

INTEREST OF AMICUS CURIAE

The American Psychiatric Association (APA), with approximately 40,000 members, is the nation's leading organization of physicians specializing in psychiatry. The APA has participated as *amicus curiae* in numerous cases involving mental health issues, including *Washington v. Harper*, 110 S. Ct. 1028 (1990), *Allen v. Illinois*, 478 U.S. 364 (1986), *Ake v. Oklahoma*, 470 U.S. 68 (1985), *Barefoot v. Estelle*, 463 U.S. 880 (1983), *Youngberg v. Romeo*, 457 U.S. 307 (1982), *Estelle v. Smith*,

451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979), *Addington v. Texas*, 441 U.S. 418 (1979), and *O'Connor v. Donaldson*, 442 U.S. 563 (1975). The APA and its members have substantial expertise on the uses and effects of antipsychotic medication. We believe that this expertise will be useful to the Court in its consideration of this case, which concerns the involuntary administration of antipsychotic medication to a criminal defendant asserting the insanity defense.[1]

STATEMENT

Petitioner David E. Riggins was charged in Nevada state court with first degree murder and robbery with use of a deadly weapon. He pleaded not guilty and not guilty by reason of insanity. After being found competent to stand trial, he was tried in November 1988. Riggins testified at his trial. He was convicted on both charges and sentenced to death.

Riggins was arrested the day of the murder, in November 1987. Within a week, a psychiatrist provided by the State, Dr. Quass, placed Riggins on Mellaril, an antipsychotic drug, with Riggins' consent. *Riggins v. State*, 808 P.2d 535, 537 (Nev. 1991); Record on Appeal (R.O.A.) 448, 740. Riggins complained of hearing voices and of having difficulty sleeping, and he said that he had taken the medication previously. R.O.A. 440-41. He also stated that he was not on any prescription medication on the morning of the killing and robbery. R.O.A. 740. His dose originally was low, 100 mg per day. R.O.A. 448.

In January 1988, the trial court ordered Riggins examined to determine his competence to stand trial. R.O.A. 25. Three psychiatrists examined him (*see* R.O.A. 77); one concluded (first in February, again in June) that Riggins was not competent to stand trial (and was insane at the time of the offenses). R.O.A. 78, 93-96. In March 1988, based on the examinations, the court found that Riggins was competent. R.O.A. 31-32. By the time of the competence determination, Riggins' original dose of 100 mg of Mellaril per day had been increased to 450 mg per day. 808 P.2d at 537; R.O.A. 441.

[1] Letters from the parties giving consent to the filing of this brief have been filed with the Clerk of the Court.

In June 1988, at the same time that he gave notice of an insanity defense, Riggins moved to terminate administration of the Mellaril. R.O.A. 52-56. He argued that continuing the medication during trial would violate his right to display his demeanor to the jury unaffected by the State (R.O.A. 54) and his "right to offer to the jury his demeanor in a state similar to th[e] one he was in at the time of the alleged offense." R.O.A. 103; *see id.* at 52-56, 100-07. He also stated that he "has done nothing to indicate that his presence, unfettered by Mellaril will in any way interfere with the State of Nevada's legitimate interest in an orderly trial." R.O.A. 56. The State opposed the motion, contending based on the psychiatric reports submitted for the competence determination that the medication was necessary to maintain Riggins' competence to stand trial. R.O.A. 79-80; *id.* at 74-87. The court held a hearing in July 1988, at which a number of psychiatrists testified. R.O.A. 401-505. The trial court denied the motion, without making any specific findings as to the need for the medication. R.O.A. 108. By the time of the hearing, and his trial in November 1988, Riggins was being medicated with 800 mg of Mellaril per day. 808 P.2d at 537; R.O.A. 415.

On appeal from his conviction, Riggins challenged the forced medication during trial. According to the Nevada Supreme Court, Riggins' principal, if not sole, argument was that involuntary medication with antipsychotic drugs during the trial deprived him of his right to present his natural demeanor to the jury as part of his insanity defense. *See* 808 P.2d at 537. The Nevada Supreme Court rejected the challenge.

The court noted, and seemingly accepted, the view of other courts addressing the issue that "the accused's demeanor has probative value where his sanity is in issue." *Ibid.* The court concluded, however, that "there was ample expert testimony regarding the effect that the Mellaril had on Riggins" and that such "expert testimony was sufficient to inform the jury of the effect of Mellaril on Riggins' demeanor and testimony." *Id.* at 538. Because of this adequate substitute for demeanor evidence, the court held that the involuntary medication did not deprive Riggins "of his rights to a full and fair trial and to present a defense." *Ibid.* In reaching that conclusion, the court nowhere examined whether the medication was needed to maintain Riggins' competence or whether the State otherwise had a sufficient justification for administering the medication.[2]

SUMMARY OF ARGUMENT

Antipsychotic medication is an accepted, beneficial, and often essential treatment for many patients suffering from psychotic disorders. In particular, such medication may be the only reasonable means of treating a defendant in custody who is mentally ill and dangerous to himself or others. *See Washington v. Harper*, 110 S. Ct. 1028 (1990). Such medication may also be the only reasonable means of restoring or maintaining a defendant's competence to stand trial.

Antipsychotic medication may be misused, however, and may have side-effects. Some of these side-effects may adversely affect a jury's impression of a medicated defendant at trial. Those potential consequences of antipsychotic medication are enough to give a defendant like

[2] The concurring opinion by Justice Rose stressed that the record was sparse on that issue. 808 P.2d at 539 (Rose, J., concurring). One justice dissented on the broad ground that "[a]n accused has a right to be present at the trial in a natural state, free from the effects of modern mind meddling." *Id.* at 542 (Springer, J., dissenting).

petitioner a cognizable due process interest that is sufficient to demand that the State have an overriding interest in order to medicate a defendant against his will.

Although that conclusion applies to all cases, demeanor evidence might be particularly influential in cases where an insanity defense is at issue. Demeanor might also be particularly influential in a capital sentencing proceeding, where the jury is called on to make a moral, and not purely factual, judgment. This case involves both circumstances. On the other hand, nothing significant is added to the analysis by petitioner's claim of a distinct constitutional interest in displaying a "psychotic demeanor" to the jury in order to bolster his insanity defense. That claim not only is unnecessary to trigger a requirement that the State justify administering the medication but, even on its merits, seems at best too weak to alter the result of the due process balance.

In striking that balance, the Court must consider the two types of state interests that might justify involuntary medication of a criminal defendant: the State's interest in restoring or maintaining the defendant's competence to stand trial; and the State's interest in treating the mental illnesses of persons in the institutional care of the State, as in *Harper*. Both of those interests are important, but only this Court can strike the balance of values that the due process analysis calls for. If the state interests are held sufficient to justify medication, however, they can be sufficient only if, in any particular case, medication is in fact necessary to serve those interests—to restore or maintain competence, or to meet the treatment needs of a defendant in custody. It is also important that both potential justifications require, as a precondition to medicating, that the medication be in the patient's medical interest and that the effects of medication be properly monitored throughout the criminal proceedings.

On the assumption that the State's *Harper* and competence interests could be sufficient if established, it is clear that the judgment below nevertheless cannot stand. The Nevada Supreme Court did not consider it necessary even to examine whether the State had justified the medication of Riggins. Moreover, there is no finding by the state trial court on either potential justification, and the record is hardly so clear as to compel any such finding and thereby make unnecessary any express findings on the issue. In these circumstances, this case at a minimum should be remanded for a determination whether any effects on petitioner at trial or at the sentencing were justified by a sufficient state interest.

ARGUMENT

THE NEVADA SUPREME COURT ERRED IN FAILING TO CONDUCT AN INQUIRY INTO, OR DEMAND SPECIFIC FINDINGS ON, WHETHER THE STATE HAD ANY OVERRIDING INTERESTS THAT JUSTIFIED CONTINUING THE ANTIPSYCHOTIC MEDICATION OF PETITIONER AGAINST HIS WISHES

A. The Uses and Effects of Antipsychotic Medication

The medication at issue in this case, Mellaril (the trade name for thioridazine), is one of a number of "antipsychotic" drugs, also called "neuroleptic" or "psychotropic" drugs. *See Washington v. Harper*, 110 S. Ct. 1028, 1032 & n.1 (1990). The category of antipsychotics differs from the other major categories of psychiatric medication, antidepressants and lithium. While the latter are used to treat potentially debilitating *mood* disorders, antipsychotics are used to treat serious disorders of the mind where reality cannot be distinguished from fantasy, manifested in hallucinations, delusions, and thought disorganization. *See* R. Baldessarini, *Chemotherapy in Psychiatry* chs. 2-4 (rev. ed. 1985). In particular, Mellaril is used to counter the effects of psychotic thought processes. *See* R.O.A. 407-08 (dose range of 300-800 mg per day); *American Psychiatric Press Textbook of Psychiatry* 771 (J. Talbott, R. Hales, & S. Yodofsky eds., 1988) (hereafter *Textbook of Psychiatry*) (dose range of 200-600 mg per day).

Psychotropic medication such as Mellaril is widely accepted within the psychiatric community as a highly effective treatment—indeed, the treatment of choice—for large numbers of persons suffering from both acute and chronic psychoses, particularly schizophrenia. As indicated by the most recent comprehensive review of the treatment of schizophrenia published by the National Institute of Mental Health (NIMH), "[a]ntipsychotic [neuroleptic] drugs generally have a dramatic effect on the symptoms of schizophrenia (e.g., delusions, hallucinations, and thought disorder) within 4-6 weeks, although improvement may continue well after that interval." Kane, *Treatment of Schizophrenia*, 13 Schizophrenia Bull. 133, 142 (1987). The NIMH review pointed out that "[a]ntipsychotic (neuroleptic) drugs remain the primary modality in the treatment of an acute episode or an acute exacerbation of a schizophrenic illness." *Id.* at 134. The study also documented the value of antipsychotic medication for the long-term treatment of chronic psychosis: "Maintenance antipsychotic drug treatment has proved to be of enormous value in reducing the risk of psychotic relapse and rehospitalization." *Id.* at 143. The study concluded: "The available data do not support the feasibility of substituting any psychotherapeutic strategy for drug treatment on an indefinite basis." *Id.* at 142. *See generally Textbook of Psychiatry* 774.[3]

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[3] "[T]here is still no single substitute for neuroleptics for control of symptoms and prevention of relapse in the majority of chronic schizophrenic patients. Denying these patients the benefit of the neuroleptic action without offering any suitable alternative may be considered a clinical error." Jeste & Wyatt, *Changing Epidemiology of Tardive Dyskinesia: An Overview*, 138 Am. J. Psychiatry 297, 306 (1981) (footnote omitted). *See also* Kane, et al., *Clozapine for the Treatment-Resistant Schizophrenic*, 45 Archives Gen. Psychiatry 789 (1988).

Antipsychotic medication may reduce a psychotic patient's dangerousness to himself or others that stems from the disorder, including violence that might otherwise require physical restraints to be prevented or controlled. *See Harper*, 110 S. Ct. at 1039 & n.9. The medication, however, is not simply a pharmacological restraint. Rather, the direct effect is to clear the hallucinations and delusions that are produced by psychosis (and that may cause dangerous behavior). The medication is thus directly therapeutic, in both the short and long terms: it alleviates the present mental suffering; and it facilitates long-term stability and decreases the need for extended hospitalization. *See Textbook of Psychiatry* 770-74 (describing effects and citing sources).[4]

The actual effects of properly used antipsychotics on mental functioning belie the spectre of mind control through " 'chemical lobotomy' " raised by the dissent in the court below. *Riggins*, 808 P.2d at 540 (Springer, J., dissenting). There is simply no clinical basis for a concern that antipsychotics impinge on protected interests in speech or thought: to the contrary, antipsychotic medication, when properly used to treat the severely mentally ill, *furthers* traditional concerns for freedom of speech and thought by enhancing the patient's ability to concentrate, to read, to learn, and to communicate. According to one study of the clinical effects of antipsychotic medication on thought processes ("mentation"), "[t]he experimental data cannot be interpreted as being consistent with a view of these drugs as mind-altering, thought-inhibiting, or destructive of personality in a negative sense. In fact, the beneficial effects of the medication on

[4] *See also* Appelbaum & Gutheil, *Rotting With Their Rights On*, 7 Bull. Am. Acad. Psychiatry & L. 306, 308 (1979); Spohn, et al., *Phenothiazine Effects on Psychological and Psychophysiological Dysfunction in Chronic Schizophrenics*, 34 Archives Gen. Psychiatry 633 (1977). The decrease in distorted thinking increases a patient's potential for deriving long-term benefits from other, non-pharmacological treatment, such as psychotherapy or milieu therapy.

complex aspects of mentation suggest that the opposite conclusion is true: the medications reinforce the most important aspects of mental functioning." Gutheil & Appelbaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77, 119 (1983).

Antipsychotic medication is thus a powerful tool for inducing (rather than impairing) competence. While it is possible to label the result "synthetic sanity" (*Riggins*, 808 P.2d at 540 (Springer, J., dissenting)), the label is misleading in its perjorative connotation suggesting condemnation of the drugs. The mental health produced by antipsychotic medication is no different from, no more inauthentic or alien to the patient than, the physical health produced by other medications, such as penicillin for pneumonia (which might be labeled "synthetic fitness" or "synthetic health"). By controlling psychotic symptoms, medication such as Mellaril is used to restore *normal* thought processes, allowing the "cognitive part of the brain to come back into play." *State v. Jojola*, 89 N.M. 489, 492, 553 P.2d 1296, 1299 (Ct. App. 1976). Accord *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379 (1978); *State v. Law*, 270 S.C. 664, 244 S.E.2d 302 (1978).

To be sure, like any medication, psychotropic medication can be abused. Such medication can be misprescribed to patients for whom it is not medically indicated; and it can be prescribed in dosages exceeding what is medically indicated. But the risk that psychotropic drugs will be misprescribed—solely, for example, to oversedate or to tranquilize a patient, without therapeutic justification (*see Riggins*, 808 P.2d at 541 (Springer, J., dissenting)) —is hardly unique to this form of medication or calls for disregard of the medical benefits. It means only that medical judgment must be carefully exercised to ensure that such medication is given only when needed to treat psychotic symptoms.

Even when properly used, antipsychotic medication—again, like other medications—can cause unwanted side effects. This Court described some of them, including the particularly serious one of tardive dyskinesia, in *Harper*, 110 S. Ct. at 1041. Most of these side-effects, however, may be controlled by lowering dosages or by adding another medication; such side effects ordinarily cease when antipsychotics are discontinued. *See* R. Baldessarini, *supra*, at 70-71; APA, *Task Force Report 18: Tardive Dyskinesia* 13-19 (1980).[5]

Of particular relevance to this case, antipsychotic medication can cause a number of side-effects that are readily observable and therefore may affect a jury's view of a medicated defendant. Notably, the drugs may cause akathisia, a form of "motor restlessness, often characterized by an inability to sit still." *Harper*, 110 S. Ct. at 1041. They may also cause parkinsonism, characterized (like the naturally occurring Parkinson's disease) by a resting tremor of the limbs, diminished range of facial expression, or slowed movements and speech. And in extreme cases, the sedation-like effect may be severe enough

[5] Tardive dyskinesia is a condition characterized by involuntary tic-like movements, generally of the tongue, of facial or neck muscles, or of the extremities. R. Baldessarini, *supra*, at 75; *see Harper*, 110 S. Ct. at 1041. But even that side-effect occurs in only a distinct minority of patients (*Harper*, 110 S. Ct. at 1041; APA, *Task Force Report 18*, at 45), is not generally progressive even when the antipsychotics are continued after the condition develops (Kane, 13 Schizophrenia Bull. at 150), and often abates some time after medication is reduced or discontinued (Jeste & Wyatt, *In Search of Treatment for Tardive Dyskinesia: Review of the Literature*, 5 Schizophrenia Bull. 251, 269, 275 (1979); *see also* Jeste & Wyatt, *Therapeutic Strategies Against Tardive Dyskinesia*, 39 Archives Gen. Psychiatry 803, 812 (1982); Yagi & Itoh, *Follow-Up Study of 11 Patients with Potentially Reversible Tardive Dyskinesia*, 44 Am. J. Psychiatry 1496, 1496, 1498 (1987)). *See Textbook of Psychiatry* 781-83. Proper medical monitoring can certainly reduce, if not arrest, the development of more serious forms of tardive dyskinesia. *See* APA, *Task Force Report 18*, at 137-53; Jus, et al., *Long-Term Treatment of Tardive Dyskinesia*, 40 J. Clinical Psychiatry 72, 75-77 (1979).

(akinesia) to affect thought processes. *See* Gutheil & Applebaum, 12 Hofstra L. Rev. at 107-08; *Textbook of Psychiatry* 777-80. There is, however, little reliable evidence that properly used antipsychotic medication has any significant adverse effect on attention or perception. Gutheil & Appelbaum, 12 Hofstra L. Rev. at 110-13. And it is well established that the foregoing side-effects are readily subject to reversal or control by adjusting doses or prescribing counteracting medication. *Id.* at 108; *Textbook of Psychiatry* 779-80.

B. The Due Process Balance

This Court's due process analysis calls for a balancing process, weighing "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). The inquiry involves two steps: " 'a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it.' " *Washington v. Harper*, 110 S. Ct. at 1036 (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982) (citations omitted)). In the present context, a defendant like petitioner has a cognizable interest in avoiding compelled medication; and that interest, while not as broad as petitioner asserts, should be deemed sufficiently frought with the potential to affect the trial as to demand inquiry, in the criminal proceeding, into whether the State has an interest in medicating that outweighs the defendant's interest in cessation of the drug.[6]

1. *The Defendant's Interests*

a. Under the Court's ruling in *Washington v. Harper*, *supra*, a criminal defendant like petitioner undoubtedly has a constitutionally recognized liberty interest in avoid-

[6] We follow the due process analysis here. It is not clear why any different analysis would be called for under a Sixth Amendment right "to a full and fair trial." Pet. i. *Cf. Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (due process guarantees fair trial, but Sixth Amendment defines basic elements of fair trial).

ing the unwarranted administration of antipsychotic drugs. 110 S. Ct. at 1036-37; *id.* at 1041 ("[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). And because the interest rests not only on the initial administration but on the effect of the medication, the liberty interest naturally covers any excessive use of antipsychotic drugs as well. *See Jones v. United States*, 463 U.S. 354, 385 n.19 (1983) (Brennan, J., dissenting). This interest is sufficient to require state justification for the involuntary administration of psychtropic medication at the prescribed dose.

b. Although the basic constitutional liberty interest recognized in *Harper* requires state justification for involuntary medication, that requirement might in particular cases have nothing to do with the patient's status as a criminal defendant. Conceivably, there may be no prejudice to his case—his demeanor or his defense—resulting from the medication. The *Harper* liberty interest, standing alone, therefore might not be sufficient to give a criminal defendant a basis for raising the due process challenge to involuntary medication in the criminal proceeding (rather than, for example, in a collateral civil suit).

The potential side-effects of the medication, however, connect the issue to the trial process. As discussed above, antipsychotic drugs may have sedative effects, may cause restlessness, and may otherwise influence the defendant's demeanor while sitting at the defense table as well as his demeanor and mode of speech while testifying. The potential adverse impact on the defendant's case is sufficient to bring the due process clause into play in the criminal case.

As the Nevada Supreme Court recognized, a defendant's demeanor and appearance in the courtroom unquestionably may have an effect on the jury. Certainly if the defendant testifies, as Riggins did, his demeanor and the

manner in which he speaks may have a significant bearing on his persuasiveness. Indeed, jury instructions often explicitly inform juries that they may consider such aspects of testimony in assessing it. *See* 1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 17.01, at 519-20 (3d ed. 1977) (jury directed to consider "demeanor and manner while on the stand" in judging witness's credibility); R.O.A. 226 (jury instruction in this case). Even if the defendant does not testify, it is only common sense that the jurors are likely to be watching him and his reactions to testimony and other courtroom events, and allowing their judgment of the defendant's guilt, or appropriate sentence in a capital case, to be influenced by those reactions.[7]

By administering medication, the State may be creating a prejudical negative demeanor in the defendant—making him look nervous and restless, for example, or so calm or sedated as to appear bored, cold, unfeeling, and unresponsive. *See, e.g.*, R.O.A. 420, 430, 465. That such effects may be subtle does not make them any less real or potentially influential. Their significance may be enhanced in a case involving the insanity defense, in which the jury may be especially sensitive to the defendant's demeanor for what it may reflect about his future conduct if acquitted. Demeanor may likewise be of special significance in capital sentencing, in which the jury is properly called on to make a partly forward-looking, moral judgment about the defendant as a person, rather than engaging in purely retrospective factfinding. *See Penry v. Lynaugh*, 492 U.S. 302, 319, 323 (1989); *Jurek v. Texas*, 428 U.S. 262 (1976).

The basic guarantee of an adversary system in which the State has the burden of proving the defendant guilty with evidence at trial, and the defendant has a broad right to select his own evidence for his defense, demands

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[7] Witnesses themselves may be affected by the defendant's demeanor when "confronting" the defendant while they are testifying. *Cf. Coy v. Iowa*, 487 U.S. 1012 (1988).

that the State be required to justify any step that imposes such an evidentiary handicap on the defendant.[8] When the State forces the defendant to start with one strike against him for no legitimate reason, he is deprived of his constitutional right to demand that the government prove its case beyond a reasonable doubt, without assistance from the defendant. *See In re Winship*, 397 U.S. 358 (1970).[9] In short, compelling medication requires justification because it may tilt the balance of the adversary system against the accused.

It is doubtless true that expert witnesses can do much to explain the altered demeanor to a jury, as the Nevada Supreme Court concluded. *Riggins*, 808 P.2d at 537-38. And the ability to explain the effects of medication, and thus to mitigate the potential harm, is surely an important factor in weighing the sufficiency of the state justification.[10] But such explanations cannot be a certain

[8] Government influencing of the demeanor of any defense witness, including the defendant, implicates the defendant's right to " 'present his own witnesses to establish a defense.' " *Webb v. Texas*, 409 U.S. 95, 98 (1972) (quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)).

[9] Such a step may be analogized to, though is obviously less intrinsically prejudicial than, forcing a defendant to wear prison clothes (*Estelle v. Williams*, 425 U.S. 501 (1976)) or shackling and gagging a defendant (*Illinois v. Allen*, 397 U.S. 337 (1970)). *See also Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986); *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978). In the due process balance, of course, the ease, or even possibility, of a state justification must vary with the potential for prejudice.

[10] The American Bar Association's Criminal Justice Mental Health Standard 7-4.14, in affirming the sufficiency of the state interest in medicating a defendant to restore or maintain his competence to stand trial, recognizes the importance of explanatory evidence, in subsection (b): "[i]f the defendant proceeds to trial with the aid of treatment or habilitation which may affect demeanor, either party should have the right to introduce evidence regarding the treatment or habilitation and its effects and the jury should be instructed accordingly."

and perfect cure for the subtle harms the defendant may suffer. And as long as the risks of prejudice are real, as they unavoidably are, a State should not be left entirely free to meddle with the defendant's demeanor, and thus help its own case, without having to offer any justification for doing so. That such an impairment of the adversary system may prove ultimately harmless, which it is by no means certain to do, does not render it any less an impairment.

Indeed, due process should be held to demand a state justification for compelled medication of a criminal defendant in every case where the defendant raises the issue, without requiring a case-by-case threshold demonstration by the defendant that the particular medication had, or would have, an adverse effect on the defendant's demeanor in the eyes of the jury. For one thing, the question of medication must be addressed before the trial, so any effect on jurors would be a matter, not of observation, but of uncertain prediction. Moreover, such effects are likely to be subtle and hard to identify objectively. At the same time, such subtle effects might be influential: demeanor may be a significant, if hard to articulate, factor in a jury's consideration of the defendant's guilt. And from the State's point of view, it is hard to see why the State should *not* have to offer a justification for compelled medication when challenged, as long as the practical burden of such a requirement is not onerous—which it should not be if, as seems proper, the testimony of the prescribing psychiatrist will suffice.[11] For those reasons, a clear general rule requiring such a

[11] Of course, the issue will not be raised in many cases because there will be no serious dispute about the need for medication. Moreover, it is to be expected that the matter often will be fully disposed of in a hearing on the defendant's competence to stand trial. It would be proper for a trial court to require some indication of a material dispute before conducting a separate hearing on the subject. And there may be no reason why, in many cases, the entire matter should not be handled through written submissions.

state justification is warranted. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (procedural due process test).[12]

c. In this Court and in the courts below, Riggins goes one step further and asserts that he has a distinct constitutionally protected interest in appearing before the jury as he appeared at the time of the alleged crime. Thus, beyond asserting the interest in not having the jury "misled by the demeanor of a defendant who appears not to care about the crime, the victim, or the proceedings or who appears overly anxious at particular moments," which we agree is protected, Riggins asserts a constitutional right to appear in his "natural" state so that the jury does not "get a false impression of the defendant's mental state at the time of the crime." Pet. 15. But this argument could not add anything to the already-established right to demand a state justification for administering medication unless this additional interest were deemed of such great weight that it outweighed a state interest that would otherwise be adequate to justify medication. The contention that this interest is so weighty as to alter the constitutional balance is untenable.

For one thing, the actual evidentiary significance of demeanor in persuading the jury of the defendant's insanity at the time of a crime is not particularly strong. An individual's psychotic state may not be evidenced in his or her appearance or demeanor. A person who appears calm may be no more or less sane—able " 'to distinguish right from wrong as to the particular act in question' " (*Williams v. State*, 85 Nev. 169, 173, 451 P.2d 848, 851 (1969)); R.O.A. 218 (jury instruction on insanity defense)—than an individual who exhibits anxious or active forms of behavior. *See, e.g.*, R.O.A. 419, 433. There is, quite simply, a weak evidentiary connection between demeanor and sanity.

[12] This is not to say that, on appeal, harmless error analysis would not be appropriate.

Moreover, with or without psychotropic medication, a defendant's demeanor and appearance in the courtroom may well be different from what it was at the time of the charged offense. The passage of time itself may alter demeanor. The formal courtroom setting, as well as the structured prison environment of a defendant in custody, may also alter the defendant's behavior and demeanor. Of course, these and other factors, including the medication, may be explained to the jury to help it understand why the defendant does not "appear psychotic." And psychiatric testimony and other evidence offer alternative —typically, more reliable—means by which the defendant may seek to prove his state of mind at the time of the offense.

Giving much weight to this interest would, in addition, create serious practical problems. If a defendant is taken off medication, he may not relapse into his psychotic state at all; a court would have to decide how long to wait before proceeding with the trial. On the other hand, the defendant may become incompetent to stand trial, necessitating potentially indefinite delays. *See, e.g.*, R.O.A. 418. The defendant may not return to his original psychotic state but develop quite different symptoms reflected in a quite different demeanor. And the defendant may, even if still competent, become unmanageable and require even more prejudicial restraints in the courtroom or require renewed medication to prevent dangerous behavior while in custody. There is no sufficient reason to impose on the courts these and perhaps other problems if the State has an otherwise sufficient justification for administering antipsychotic medication.[13]

[13] Beyond the defendant's interests discussed in text, a defendant, of course, has a right not to be rendered incompetent to stand trial—necessarily implied by his right not to *be* incompetent at trial. *See Drope v. Missouri*, 420 U.S. 162, 171-72 (1975). Abuse of psychotropic drugs, like abuse of almost any drug, could conceivably impair that right by interfering with a defendant's ability to understand the proceedings and to assist counsel. *See, e.g.*,

2. *The State's Interests*

The first of the two obvious state interests that might justify antipsychotic medication of a criminal defendant against his will is reflected in *Washington v. Harper*, *supra*. The Court there upheld such medication of prisoners when it was "in the prisoner's medical interests, given the legitimate needs of his institutional confinement" (110 S. Ct. at 1037)—in that case, when a psychiatric determination was made that the medication was appropriate treatment for the mental illness of a patient who was gravely disabled or dangerous to himself or others. *Id.* at 1035, 1039. The clinical decision to administer antipsychotic medication should take into account the patient's wishes, the implications of involuntary treatment, the risks of foregoing treatment for an individual who may prove violent, the individualized risk of side effects, and the relative risks and benefits of other potential treatments.[14] When made in that manner, the decision to medicate largely brings together the legitimate institutional interests of the State and the patient's interest in receiving appropriate treatment (itself a state interest, through the State's *parens patriae* power).[15] This state interest in treatment consistent with individual and institutional needs, of course, applies to all individuals in the State's institutional care, including a criminal defendant awaiting trial.

R.O.A. 420. But Riggins' counsel did not claim at or before Riggins' trial, and Riggins has not claimed here, that the administration of Mellaril rendered Riggins incompetent to stand trial. *See, e.g.*, R.O.A. 503.

[14] *See Rennie v. Klein*, 720 F.2d 266, 272 (3d Cir. 1983) (Adams, J., concurring); *id.* at 273-74 (Seitz, C.J., concurring); Appelbaum & Gutheil, *Clinical Aspects of Treatment Refusal*, 23 Comprehensive Psychiatry 560 (1982).

[15] *See Youngberg v. Romeo*, 457 U.S. 307, 321 (1982); *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves"); *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

The second state interest that might justify involuntary medication of a criminal defendant is the state interest in restoring or maintaining his competence to stand trial. A defendant who is suffering from severe psychoses may not be able to understand the criminal proceedings or assist in his defense. *See Drope v. Missouri*, 420 U.S. 162 (1975). The fact is that, given the dearth of comparably effective alternatives to antipsychotic medication, such a defendant may remain in that condition indefinitely if medication is not given. Allowing that result would impair strong state interests: the interest in *promptly* adjudicating a defendant's guilt (*see Flanagan v. United States*, 465 U.S. 259, 264-65 (1984)); the interest in *ever* adjudicating the case, for delay may result in the disappearance of crucial evidence and make a trial impossible (*see Barker v. Wingo*, 407 U.S. 514 (1972)); and the interest in not having to "warehouse" an unconvicted individual indefinitely, especially one who could be made competent through medication.

Whether these state interests outweigh the defendant's interests is ultimately a matter only this Court can decide. In striking the due process balance, however, the Court should recognize that the two state interests will often reinforce each other: treatment and institutional needs will often coincide with the need to restore or maintain competence. The Court must also consider whether the balance is different for trials and for capital sentencings, which involve different jury determinations that may be influenced differently by the effects of medication on a defendant's demeanor.

In general, though, on one side of the balance, the various state interests are obviously important ones. These include the state interest in avoiding either indefinite institutional confinement without appropriate care or the "revolving door" effect that might follow from recognizing any rigid right of a defendant to be unmedicated when tried—medicate to competence, for *Harper*-type reasons, while the defendant is in custody before trial; stop medication as the trial approaches; post-

pone the trial as the defendant becomes incompetent while off medication; resume medication to competence upon return to custody; then repeat the cycle. *See* ABA Criminal Justice Mental Health Standard 7-4.14 Commentary, at 253. On the other side of the balance, it is important to consider that monitoring and explaining the effects of medication can reduce the adverse impact on the defendant's criminal case and that, as explained above, the medication itself, properly used, has powerful medical benefits for the defendant. However the Court strikes the balance, it should remain a basic precondition to prescribing medication that the medication be appropriate treatment in the defendant's medical best interests, that there be appropriate monitoring and counteracting of any side-effects (particularly those which might affect jury opinions), and that the defendant be entitled to offer evidence explaining his demeanor to the jury. *See* ABA Criminal Justice Mental Health Standard 7-4.14 ("A defendant should not be considered incompetent to stand trial because the defendant's present mental competence is dependent upon continuation of treatment or habilitation which includes medication . . . .").[16]

C. The Record in This Case

Even if the State could justify involuntary medication on the grounds discussed above, the Nevada Supreme Court erred in this case. That court rejected Riggins' claim without making any inquiry into whether the medication was necessary to serve any state interest. *Riggins*, 808 P.2d at 537-38. Moreover, the state trial court made no findings that the medication, in the concededly very high dose of 800 mg per day that was being given to

[16] The manner in which the State may establish its interests should be left, like other evidentiary matters, to the discretion of the trial judge. We see no basis for a rule that, always or even presumptively, requires the cessation of medication for a period to determine the need for the medication. Such a medical experiment carries risks to the defendant, the prison, and the State's judicial system; and psychiatric and other testimony often will be an adequate basis for the court's determination.

Riggins (*see* R.O.A. 431, 473, 504-05), was necessary to treat a mental illness consistent with proper institutional needs or to maintain Riggins' competence to stand trial. *See* R.O.A. 108 (denying termination of medication, without opinion), 495-505 (argument of counsel after hearing on motion to terminate medication; court taking motion under advisement). The administration of the medication cannot be found lawful without any such findings. And a remand is necessary because the evidentiary record is hardly so clear and one-sided on the issues that only one conclusion is possible.[17]

Thus, on the question of a *Harper*-type justification, the trial court gave no indication that it thought the State had any such justification. *See* R.O.A. 495-505. The whole issue of dangerousness or deterioration, in fact, was never explored below, because the State did not base its argument for involuntary medication on any claim of a *Harper* interest; the State argued only "that medication in this case is required in order to continue the defendant's competency." R.O.A. 497; *see id.* at 496-99 (prosecutor's closing argument at hearing on termination

[17] Not suprisingly, there are likewise no specific findings on what adverse effect, if any, the medication had on Riggins' demeanor before the jury, either while listening to others testify or while testifying himself. In our view, as explained above, no such effect need be demonstrated in a particular case before the State is required to justify the medication. *See* page 15, *supra*. If a demonstration of effects is needed, however, the issue should be left for remand, because the record seems sparse, and less than clear, on the issue. *See, e.g.*, R.O.A. 429 (Dr. Master: defendant closed eyes several times at hearing), 445 (Dr. Quass: no apparent effect), 503 (trial court referring to "the expert testimony that [Riggins] is sedated"), 505 (trial court: "there is some indication that it might have some adverse effects with this type of a dosage"), 753 (Dr. Jurasky discussing possible sedative effects of Mellaril), 834 (Dr. Master on same subject). Of course, the inquiry into adverse effects on demeanor may look much like the harmless error inquiry that the courts might undertake even if they examine the adequacy of the asserted state justifications first and find them wanting.

of medication); *id.* at 74-87 (State's brief on issue). On the other hand, one doctor testified that if Riggins stopped taking Mellaril, "he would be dangerous" and that "the Mellaril allows him to act in more or less a normal manner." R.O.A. 753 (Dr. Jurasky). But that apparently isolated testimony, which was offered by Riggins, did not specifically focus on whether he would deteriorate or be dangerous while confined. And the medication was originally prescribed, not for reasons of dangerousness, but simply because Riggins complained of hearing voices and was having trouble sleeping. R.O.A. 441-42 (Dr. Quass). The record, in short, can hardly compel a finding that the medication was necessary to serve the State's (unasserted) treatment and institutional interests.

On the question of maintaining competence, the record contains substantial evidence from the State's own witnesses suggesting that the medication, at least in the high dose of 800 mg per day, was *not* necessary to maintain Riggins' competence. Thus, Dr. Quass, the doctor who originally prescribed the medication after Riggins' arrest, answered "yes" when asked if it was his "opinion that [Riggins] would be competent to stand trial even without the administration of Mellaril." R.O.A. 443. Dr. Quass explained: "At the time [Riggins] was started on Mellaril I considered him to be competent. He was not grossly psychotic at any time." R.O.A. 443. Although there was a possibility that Riggins could become psychotic if his Mellaril were stopped, Dr. Quass added, he "would be surprised if that happened." R.O.A. 444. *See also* R.O.A. 449-50. Dr. O'Gorman, who saw Riggins in both 1982 and 1988, doubted that the high dose was necessary and testified that he "never saw [Riggins] as an incompetent person" at either time (R.O.A. 475) and that he did not know what would happen if the medication were discontinued (R.O.A. 476). Dr. Master, who saw Riggins only when he was medicated (R.O.A. 410), said that his "guess is that taking . . . [Riggins] off of

medication would have no noticeable effect," although "there is always the possibility" of an effect. R.O.A. 412. At trial, he added that he "would never prescribe Mellaril for Mr. Riggins as he is now." R.O.A. 836; *see* R.O.A. 837-38.

At a minimum, therefore, a remand is appropriate for the state courts to determine whether the medication was necessary to serve the State's asserted interests. On remand, the state courts should consider whether the necessary findings can be made on the present record. If not, the courts would have to decide whether any additional hearings could be meaningful years after the trial. The state courts should, in addition, be permitted to decide whether, even if the medication violated Riggins' due process rights, the error can legally and factually be deemed harmless. Of course, the harmless error inquiry might itself be meaningless without a new hearing into the effect of the medication on Riggins' demeanor at trial. All of these questions are sensibly left for remand.

CONCLUSION

The judgment of the Nevada Supreme Court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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November 1991

NO. 90-8466

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1991

DAVID E. RIGGINS,
Petitioner,

v.

THE STATE OF NEVADA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ON THE MERITS IN SUPPORT OF PETITIONER

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STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc., (NACDL) is a District of Columbia non-profit corporation with a nation-wide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the

improvement of the criminal law, its practices and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment rights to present a defense to criminal charges and to the effective assistance of counsel. NACDL is very concerned about any decision that would undermine or dilute these constitutional guarantees, as would adoption of the position taken by the respondent in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the petitioner and the respondent have consented to NACDL's participation as amicus curiae pursuant to Rule 37.3 of the Rules of this Court, and letters of consent have been filed with this Court.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Nevada in the instant case should be reversed. The trial court's order denying Mr. Riggins' motion to terminate his medication with a powerful tranquilizer deprived Mr. Riggins of his right to effectively defend himself against the charge of first degree murder and the imposition of a death sentence.

The trial court's order also precluded Mr. Riggins' counsel from providing his client the effective assistance of counsel to which he was entitled under the Sixth Amendment to the United States Constitution.

David Riggins' personality and demeanor in an untranquilized state are an integral part of his defense of insanity at the time of the offense, and accordingly

his counsel moved to permit the jury to see this evidence. The court's order prevented this from occurring.

Further, the standards applicable to counsel in death penalty cases require that all efforts be made to present a "humanized" individual to the jury -- a living, breathing, feeling, and responsive individual upon which the jury will be less likely to impose a sentence of death. Because the state forced medication upon Mr. Riggins, transforming him into a sedate, non-responsive individual, Mr. Riggins' counsel was unable to comply with the standards applicable to attorneys representing clients in capital cases.

This Court has made clear that a citizen accused of a criminal offense has a clear right to present all relevant evidence in his effort to defend himself and that unjustified state imposed

restrictions upon that ability will be struck down.

This Court also has made clear that the right to a fair trial encompasses the right to effective assistance of counsel and has struck down unjustified restrictions upon counsel's ability to make independent decisions about how the defense of his or her client should be conducted.

The state's action in this case is constitutionally indistinguishable from state controls on how a defense can be presented to criminal charges and how an attorney can provide effective representation to his or her client.

For all these reasons, the Supreme Court of Nevada's decision affirming the forced medication of an individual during his criminal trial with no concrete justification must be set aside by this Court.

ARGUMENT

THE FORCED DRUGGING OF A CRIMINALLY ACCUSED CITIZEN DURING HIS TRIAL FOR FIRST DEGREE MURDER DEPRIVED HIM OF HIS CONSTITUTIONAL RIGHTS TO EFFECTIVELY DEFEND HIMSELF AGAINST THAT CHARGE AND THE IMPOSITION OF A DEATH SENTENCE

The question this Court answers in this case will have a far reaching impact upon the balance of power currently built into our criminal justice system. That question is under what circumstances the state and not the criminally accused and his or her counsel can control the defendant's appearance and behavior during the trial. In other words, can the critical choice of how the defendant will be presented to the jury be constitutionally removed from the defendant's table in the court room and placed in the hands of the state that seeks to convict and punish him?

Amicus NACDL asserts that for the reasons that follow, the State of Nevada's interference, in fact, control, over how David Riggins presents himself to the jury in an effort to defend against the charge of first degree murder (and if unsuccessful, persuade that jury not to impose upon him a sentence of execution by lethal injection) constitutes an impermissible deprivation of his right to defend himself and to the effective assistance of counsel in that effort.

A. A Citizen Accused's Sixth and Fourteenth Amendment Rights to Present a Defense and to the Effective Assistance of Counsel Free From Unjustified Governmental Interference

This Court's precedents examining a criminal defendant's trial rights are replete with decisions confirming a defendant's right to present a defense unfettered by unnecessary and unjustified state imposed controls. E.g., **Washington**

v. Texas, 388 U.S. 14 (1967); Webb v. Texas, 409 U.S. 95 (1972); Chambers v. Mississippi, 410 U.S. 284 (1973); Ake v. Oklahoma, 470 U.S. 68 (1985).

This Court's precedents also illustrate that the defendant's right to effective assistance of counsel is abridged when a governmental entity interferes with the ability of counsel to make independent decisions about how to conduct the defense. E.g., Geders v. United States, 425 U.S. 80 (1976); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972); Ferguson v. Georgia, 365 U.S. 570, 593-96 (1961).

It is these two distinct but interrelated rights that were abridged by the forced drugging of David Riggins during his trial for first degree murder.

1. An Accused's Right to Present a Defense Free From Unjustified Governmental Interference

In Washington v. Texas, 388 U.S. 14 (1967), the Court was faced with the constitutional impact of a Texas statute that prevented individuals charged as a co-participants in the same crime from testifying for one another although there was no bar to their testifying for the state. 388 U.S. at 16-17. This Court unanimously held that this statute unconstitutionally precluded the defendant from presenting evidence relevant to his defense. Id. at 23.

The Washington Court described the right to present a defense as follows:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as

> **the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental element of due process of law.**

Id. at 19. (emphasis supplied).

The Court thus balanced a state's evidentiary rule which had a legitimate (but severely criticized) justification with the fundamentally important right of a defendant to present his defense and struck the balance in favor of the defendant's right to fully present his defense. See also, **Webb v. Texas**, 409 U.S. 95, 98 (1972); **Chambers v. Mississippi**, 410 U.S. 284, 294 (1973).

The most recent refinement of this Court's jurisprudence addressing the fundamental right to present a defense is **Ake v. Oklahoma**, 470 U.S. 68 (1985). The issue in **Ake** was whether the Constitution requires that an indigent defendant have

access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition. Id. at 71.

The Court reaffirmed that a "criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." Id. at 77. The Court emphasized that the State's interest is not simply in prevailing at trial but encompasses something broader -- the interest in the fair and accurate adjudication of criminal cases. Therefore, the Court declared that "a state may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the

accuracy of the verdict obtained." Id. at 79.

Therefore, the **Ake** Court went beyond merely striking down an unjustified restriction on the defendant's opportunity to present evidence to the jury that would bolster his defense and assist the jury in its fact finding function. The Court imposed an affirmative obligation to provide the defendant with the opportunity to present all pertinent evidence because of the importance of that evidence to an accurate verdict.

Accordingly, at the core of this Court's decisions embracing the defendant's unabridged right to present a defense is its recognition not only of fundamental fairness in our adversary system of justice but also its interest in ensuring that the jury is not deprived of clearly pertinent evidence, which can assist them in reaching

an accurate determination of the issue which they are confronting.

In the instant case, both of these concepts were adversely impacted by the Court's refusal to permit the termination of medication. The State of Nevada maintained an illegitimate strategic advantage over the defendant by controlling his appearance and demeanor during the trial. Furthermore, the accuracy of the jury's verdict on the question of Mr. Riggins' sanity was adversely impacted because the jury was precluded from seeing Mr. Riggins in his untranquilized state of mind -- his state of mind at the time of the offense.

2. The Concomitant Right To The Effective Assistance Of Counsel Free From Unjustified Governmental Interference

The constitutional right to present a defense is implemented through the defendant's sixth amendment right to counsel. This Court has made clear that the "right to counsel plays a crucial role on the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." **Strickland v. Washington**, 466 U.S. 668, 685 (1984) (quoting **Adams v. United States, ex rel. McCann**, 317 U.S. 269, 275-76 (1942)).

It is also without question that the right to counsel is the right to the effective assistance of counsel and that the Government violates this when it "interferes in certain ways with the

ability of counsel to make independent decisions about how to conduct the defense." **Strickland**, 466 U.S. at 686 (citing **Geders v. United States**, 425 U.S. 80 (1976) (bar on attorney-client consultation during over-night recess); **Herring v. New York**, 422 U.S. 853 (1975)(bar on summation at bench trial); **Brooks v. Tennessee**, 406 U.S. 605, 612-13 (1972) (requirement that defendant be first defense witness); **Ferguson v. Georgia**, 365 U.S. 570, 593-96 (1961) (bar on direct examination of defendant)).

Two of the above-cited decisions, **Ferguson v. Georgia**, 365 U.S. 570 (1961) and **Brooks v. Tennessee**, 406 U.S. 605 (1972), provide particularly persuasive precedent for the proposition that the State's control, through forced medication, of the manner in which David Riggins and his counsel chose to present Mr. Riggins to

the jury, unconstitutionally interfered with Mr. Riggins' right to the effective assistance of counsel.

The **Ferguson** Court reviewed a Georgia statute that precluded defense counsel from eliciting the defendant's testimony through questions. This Court held that this interference with the manner in which the defendant presented his version of the facts to the jury was unconstitutional because it deprived the accused of "'the guiding hand of counsel at every step in the proceedings,' . . . within the requirement of due process in that regard as imposed upon the States by the Fourteenth Amendment." **Ferguson**, 365 U.S. at 572 (quoting **Powell v. Alabama**, 287 U.S. 45, 69 (1932)).

The Tennessee statute at issue in **Brooks** controlled the order in which a defendant could present his case by

requiring that a defendant testify before any other witness for the defense. 406 U.S. at 606.

The **Brooks** Court found that this statute violated the defendant's constitutional right to remain silent in that the burden imposed upon the exercise of that right was not justified by the State's interest in preventing testimonial influence. 406 U.S. at 611. As an additional ground for its decision, this Court found that the Tennessee statute at issue infringed upon the defendant's right to due process as defined in **Ferguson**. **Brooks**, 406 U.S. at 612.

The **Brooks** Court reasoned that the choice as to whether a defendant will testify on his behalf is an important tactical decision in addition to being a constitutionally protected right. Id. The Court concluded that requiring the accused

and his lawyer to make this decision without the opportunity to evaluate the actual worth of their other evidence "restricts the defense -- particularly counsel -- in the planning of its case." Id. The Court held that the accused and his counsel may not be restricted in deciding whether and when the accused should take the stand in the course of presenting his defense. 406 U.S. at 613.

This Court has thus recognized the fundamental importance of a defendant's testimony to his defense of criminal charges. Accordingly, this Court embraced the principle that a defendant and his counsel have an unfettered right to choose whether, when, and how, the accused should take the stand. Most importantly, these two cases stand as testaments to the quickness with which this Court will strike

down state imposed controls on how this critical choice is exercised.

It follows from these decisions that if the State cannot constitutionally control the decision as to whether a defendant will testify and the manner in which he will present his testimony, the State similarly cannot constitutionally decide for the defendant the state of mind in which he will present his defense.

B. The State of Nevada's Forced Drugging of David Riggins Violated his Constitutional Rights to Present a Defense and to the Effective Assistance of Counsel thus Depriving him of a Fair Trial

The State of Nevada's drugging of David Riggins against his will dramatically altered his demeanor from that which existed at the time of the charged offense and thus precluded him and his counsel from presenting his message of insanity in an effective manner. The State's action also precluded Mr. Riggins' counsel from

complying with the standards for competent representation in death penalty cases. These standards mandate that a defendant on trial for his life be humanized for the jury that will decide his fate.

Thus, as a result of the state's medication of Mr. Riggins transforming him into a mask-like robot at counsel table, Mr. Riggins was deprived of his right to constitutionally effective counsel.

For the reasons that follow, these constitutional deprivations resulted in an unfair trial for Mr. Riggins and accordingly, this court should overturn the judgment of the Supreme Court of Nevada.

1. The Messenger is an Essential Part of the Message -- The State's Forced Tranquilizing of David Riggins Deprived Him of his Right to Present the Messenger in a Fashion Essential to his Defense

> **From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself.**

McKaskle v. Wiggins, 465 U.S. 168, 179 (1984) (emphasis supplied).

Thus, of fundamental importance to the question at hand, this Court recognized the significance of the appearance of the defendant to the jury in its decision making process.

In **McKaskle**, Justice O'Connor, addressed the importance of a defendant's right to proceed pro se and noted that the participation of stand-by counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.

McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). Justice O'Connor made clear that the right to appear pro se exists to affirm the "accused individual's dignity and autonomy." 465 U.S. at 178. Thus, appearing before the jury in the status of one who is defending himself may be equally to the pro se defendant important as other fundamental constitutional rights. Id.[1]

Thus, this Court has affirmed the dignity and autonomy of the accused by stressing the importance of their right to appear to the jury as one standing alone

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[1] Justice O'Connor cited the right to be present at all important stages of the trial, that a defendant may not normally be forced to appear in court in shackles or prison garb, and that the defendant has a right to present testimony in his own behalf. Id. at 178 (citing **Snyder v. Massachusetts**, 291 U.S. 97 (1934); **Estelle v. Williams**, 425 U.S. 501, 504-5 (1976); **Harris v. New York**, 401 U.S. 222, 225 (1971); and **Brooks v. Tennessee**, 406 U.S. 605, 612 (1972)).

against the power of the state. Surely, the dignity and autonomy of a mentally ill citizen charged with a capital offense is equally important, and that individual has a right to appear before the jury that will decide his fate drug free if that is his desire.[2] More significantly, this Court also affirmed the critical importance of the defendant's appearance as an integral part of the defense message.

For this reason, the Court has condemned unnecessary state imposed controls on how a defendant will be presented to the jury. The state cannot

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[2] This brief does not address the serious impact that the State of Nevada's forced drugging of David Riggins upon Mr. Riggins' liberty interest in avoiding unwanted antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment. See **Washington v. Harper**, _____ U.S. _____, 110 S.Ct. 1028, 1036 (1990). Amicus Curiae anticipates that this issue will be addressed in other briefs filed with this Court.

compel a citizen accused of a crime to stand trial before a jury while dressed in identifiable prison clothes. **Estelle v. Williams**, 425 U.S. 501, 504-5 (1976). Further, external shackles or gags to restrain a defendant have only been justified in the rare situations where that practice is necessary to control a stubborn, disobedient defendant. See e.g., **Illinois v. Allen**, 397 U.S. 337, 344 (1970).

In the instant case, David Riggins' appearance and behavior as it was at the time of the offense is a critical component of his insanity defense in the charge of first degree murder.

The state courts that have addressed the issue now presented to this Court have, with virtual uniformity, recognized that the trier fact is entitled to consider the defendant's demeanor in

court on the issue of whether or not the defendant was legally insane at the time of the charged offense. E.g., **Commonwealth v. Louraine**, 390 Mass. 28, 34-35, 453 N.E.2d 437, 442 (1983); **People v. Hardesty**, 139 Mich. App. 124, 140, 362 N.W.2d 787, 795 (1984); **People v. Van Daver**, 79 Mich. App. 539, 541-42, 261 N.W.2d 78, 79 (1977); **State v. Hayes**, 118 N.H. 458, 462, 389 A.2d 1379 (1978); **In Re Pray**, 133 Vt. 253, 257, 336 N.E.2d 174, 177 (1975); **State v. Maryott**, 6 Wash. App. 96, 101, 492 P.2d 239, 242 (1977); **State v. Murphy**, 56 Wash. 2d 761, 355 P.2d 323 (1960). The **Murphy** Court found the defendant's demeanor in an unmedicated condition relevant to the determination of whether the death penalty should be imposed and reversed the defendant's conviction when forcibly medicated during his trial. **Murphy**, 355 P.2d at 327.

The **Louraine** Court reversed the defendant's conviction for first degree murder on facts remarkably similar to the instant case. **Louraine**, 453 N.W.2d at 439. The victim had been repeatedly stabbed. Id. The defendant had a long history of mental illness, suffered hallucinations, was diagnosed as a paranoid schizophrenic, and heard voices. From the time of his arrest until trial, the defendant was held in a state hospital and given increasing dosages of anti-psychotic medications including Mellaril, the same medication forced upon David Riggins. Id. at 440-41.

The Massachusetts Supreme Judicial Court began its analysis with the proposition that the defendant has a fundamental right to present his version of the facts. 453 N.E.2d at 441.[3] The

[3] The court cited **Washington v. Texas**, 388 U.S. 14, 19 (1967).

Louraine court made clear that a defendant is entitled to place before the jury any evidence which is at all probative of his mental condition. Id. at 442. Stressing the importance of the jury's view of the defendant's demeanor, the Court stated:

> In a case where an insanity defense is raised, the jury are likely to assess the weight of the various pieces of evidence before them with reference to the defendant's demeanor. Further, if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. . . . This tendency may render also valueless the defendant's right to testify on his own behalf.

Id.

The court found that the ability to present expert testimony describing the effect of medication on the defendant was not an adequate substitute for the presentation to the jury of the defendant's own demeanor in an unmedicated condition. Id. In the end, the Court recognized the inherent unfairness of the State's control over the demeanor with which the defendant will be presented to the jury.

> 'If the state may administer tranquilizers to a defendant who objects, the state then is, in effect, permitted to determine what the jury will see or not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury's consideration of his mental condition.'

Id. (quoting **State v. Maryott**, 6 Wash. App. 96, 102, 492 P.2d 239 (1971)).

The **Louraine** decision is an important example of a state supreme court's recognition of the defendant's fundamental right to present his version of the facts unfettered by unjustified state interference that this Court recognized. More significantly, the Massachusetts Supreme Judicial Court in **Louraine** as well as other decisions cited herein, recognized that a defendant's own personality and demeanor is as equally important to the defendant's version of the facts as the defendant's right to testify in support of that version.

There is simply no more effective way to present the message of a defendant's lack of criminal responsibility due to a defective mental condition than to have the jury observe that defective mental condition at trial. "[N]o expert witness is as effective in making schizophrenia

real to a jury as is schizophrenia itself." Blinder, Martin, M.D. Psychiatry in the Practice of Everyday Law, 116 (1973). See also, Fentiman, L.C., Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant, 40 U. Miami L. Rev. 1109, 1127 (1986). However, in the instant case, the forced medication of Mr. Riggins dramatically altered his demeanor from that which existed at the time of the offense.

David Riggins testified that he had been hearing voices virtually all his life that he first believed were aliens and now believed to be the devil trying to possess his body. Mr. Riggins justified the homicide on two bases: first, his belief that the victim had killed two little girls in the past; and second, his belief that the victim had tried to kill Riggins by putting fiberglass in his water

supply and squirting his AIDS infected blood on cocaine prior to selling it to Riggins. Mr. Riggins was diagnosed as a paranoid schizophrenic by one of the psychiatrists who examined him. Yet, the jury was not permitted to see the real David Riggins. Mr. Riggins was under the influence of 800 mg. of Mellaril per day -- a sufficient dosage, according to one of the psychiatrists who testified, to "tranquilize an elephant."

One of the several side effects of a medication such as Mellaril on a paranoid schizophrenic is to reduce or eliminate the overt symptoms of schizophrenia. One of these side effects, akinesia, causes the defendant to feel a lack of energy, and to complain of being "dead inside," and to feel that everything is boring and that nothing matters. Fentiman, L.C., Whose Right is it Anyway?:

Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant, 40 U. Miami L. Rev. 1109, 1129 (1986) (quoting Van Putten, Why do Schizophrenic Patients Refuse to take Their Drugs?, 31 Archives General Psychiatry, 67, 69 (1974)). See also, Kemna, Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs, 6 J. of Legal Med. 107, 110 (1985). From an external point of view, akinesia may alter the defendant's facial expressions so that the defendant appears in mild cases to "lack spontaneity of expression, and in severe cases to have a wooden 'mask-like' face." Fentiman, supra.

In view of the significant impact that medication with an anti-psychotic drug has upon an individual suffering from a severe psychosis, there can be little question that the State's forced medication

of David Riggins eliminated him as an effective messenger to communicate that he was insane at the time of the killing. The state's action further unconstitutionally interfered with the decision of Mr. Riggins and his counsel as to how his message of insanity at the time of the offense would be presented.

Mr. Riggins and his counsel were not able to independently judge how termination of medication would effect Mr. Riggins because the trial court never gave them that opportunity. Further, Mr. Riggins and his counsel were never able to independently decide whether and to what extent Mr. Riggins would testify on direct examination and how he would respond to cross examination in the absence of medication.

The State's action controlled Mr. Riggins' appearance just as clearly as it

would have if the state and not Mr. Riggins and his counsel had determined how Mr. Riggins would dress, the length of Mr. Riggins' hair, whether Mr. Riggins would appear with facial hair, or how Mr. Riggins would react to the testimony introduced against him at the trial.

The state imposed requirement that Mr. Riggins be medicated at trial in this case makes it constitutionally indistinguishable from other cases in which this Court has condemned unjustified interferences with the choice of a citizen and his counsel as to how that citizen's defense will be conducted. **Herring v. New York**, 422 U.S. 853 (1975); **Brooks v. Tennessee**, 406 U.S. 605, 612-13 (1972); **Ferguson v. Georgia**, 365 U.S. 570, 593-96 (1961).

2. The State's Forced Drugging of David Riggins Also Precluded his Counsel from Complying With the Governing Standards for Competent Representation in Death Penalty Cases that Command that the Defendant be Humanized

Even the most competent criminal defense lawyers may not defend a particular client in the same way. **Strickland v. Washington**, 466 U.S. at 689. Yet, the literature prepared by counsel experienced in death penalty litigation makes unquestionably clear that **in any death penalty case** counsel are to do all that they can to **humanize** the defendant. The common sense reason for this unequivocal command to individuals charged with the responsibility of representing a capitally accused individual is that jurors find it much easier to vote for the execution of an "inhuman criminal" when all they know about him or her are the terrible facts of the crime. Jurors find it much more difficult

to vote for the execution of the accused when they are faced with evidence during the trial or during the penalty phase that brings the defendant to life as a living, breathing, feeling, human being who cares what happens to him or her. Goodpaster, G., The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 335-36 (1983).

A review of publications from around the country addressing what should be done on behalf of a capitally accused client are consistent in their command that the client be humanized.

The California Attorneys for Criminal Justice and California Public Defender's Association recommend that counsel portray the defendant as a human being with positive qualities. California Attorneys for Criminal Justice and

California Public Defender's Association, 1991 California Death Penalty Defense Manual, Chapter 8, at 1 Penalty Phase Mitigation, (prepared by James S. Thompson and Michael Lawrence) (quoting Goodpaster, supra).

Georgia's manual states that "the objective of the defense at the sentencing phase will almost always be to humanize the person on trial and establish reasons, which while not excusing or justifying the commission of the crime, nevertheless help explain the client's life and provide a basis for his sentence less than death." Southern Prisoners' Defense Committee, 1987 Defending a Capital Case in Georgia 1009.

According to Mississippi's manual, the "jurors find it much easier to vote for the execution of a 'criminal' when all they know about him or her are the facts of a terrible crime. It is therefore

absolutely critical to humanize a client." 1991 Defending a Capital Case in Mississippi, Section B, at 23.

Finally, in Tennessee, it is essential that the jurors be made to see the defendant as a real, multi-faceted human being. The jury is less likely to impose death on a "person" than on a "vicious" animal. Tennessee Association of Criminal Defense Lawyers, 1987 Tools for the Ultimate Trial, The TACDL Death Penalty Defense Manual, 10.5-6 (2d Ed.).[4]

A defense lawyer charged with persuading a jury not to impose a sentence of death upon his client must vividly present the life and background of the client and present witnesses who can articulate those aspects of the defendant's

[4] The pertinent portions of the above-cited publications are reproduced in the Appendix. (App. 1a-21a).

character that will establish mitigating factors about the client. Presentation of this type of evidence without what would be considered a normally warm responsive reaction by the defendant is ineffective and useless. Thus, a defendant sitting in the courtroom under the influence of heavy tranquilizers who is non-responsive and non-caring strips this presentation of its impact.

The presentation of mitigating evidence at the sentencing phase of a capital trial requires the enthusiasm and the participation of the defendant in the investigation stage of that process. Without the client's assistance, attorneys are unable to discover this valuable mitigating evidence. California Death Penalty Manual, supra, Chapter 8, at 3 (1991 Ed.). (App. at 1a -12a).

Anti-psychotic medication also generates a cognitive dulling that impairs the defendant's ability to remember, reason or function effectively in a complex learning situation. This effect of the medication can have a devastating impact on the defendant's ability to assist his attorney in preparing a defense. Further, the chemical flattening of a person's will can also lead to the defendant's loss of self-determination undermining the desire for self-preservation which is necessary to engage the defendant in his own defense in preparation for his trial. Fentiman, L.C., Whose Right is it Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant, 40 U. Miami L. Rev. 1109, 1133 (1986).

Illustrative of the impact that the medication of David Riggins had upon him at his trial is the presentation of his

plea for life at the sentencing hearing. Mr. Riggins had prepared a statement to present to the jury in his own personal effort to persuade them to let him live. Because of the self-defeating impact of the Mellaril, Mr. Riggins did not have the inner strength to make this critical presentation on his own. His lawyer read this statement to the jury for him.

A common technique among those who represent the capitally accused is to present that individual personally to the jury in the sentencing hearing. Tools for the Ultimate Trial, the TACDL Death Penalty Manual, 10:5-7 (2d Ed. 1987) (App. at 20a). Although Mr. Riggins' and his counsel planned to use this technique, the State's action precluded them from implementing this time-tested practice.

Those experienced in capital litigation also emphasis the value of body

language between the attorney and client that assists in the humanization process. Body language such as touching the client, patting the client on the back, etc., assists in persuading the jury that the counsel considers the client a human being. Tools for the Ultimate Trial, The TACDL Death Penalty Manual, 10.5-6 (2d Ed. 1987). (App. at 15a-21a). A drugged mask-like figure sitting next to counsel who does not respond in a human way to the expressions of affection and respect by his counsel makes it difficult, if not impossible, to accomplish the command that the accused be humanized.

Finally, competent counsel know that physical appearance is something to which attention must be paid. Clothing is to be consistent with the courtroom and conservative attire that minimizes the gruesome aspects of the alleged crime

should be chosen. Appearance does not stop at clothing or hair, but, facial expressions and demeanor are all part of appearance. A medicated client's demeanor and expression should fit the strategy. When the strategy is to prove the defendant insane, the natural demeanor of the client must be preserved. See Tools for the Ultimate Trial, The TACDL Death Penalty Defense Manual, 10.6-7 (2d Ed. 1987). (App. at 15a-21a).

It is simply impossible to humanize a mask-like zombie -- the condition in which extreme dosages of Mellaril left David Riggins. Accordingly, Mr. Riggins' counsel, despite his best efforts, simply could not comply with this most basic standard applicable to counsel in capital cases.

CONCLUSION

The impact upon the right to present a defense and the right to effective assistance of counsel as a result of the forced medication of David Riggins was concrete. David Riggins was precluded from presenting critical evidence of his mental condition at the time of the offense -- his behavior at the time of the offense and presenting a humanized individual to the sentencing jury. These impairments of his right to defend himself were without compelling state interest. No showing was made at the trial court that Mr. Riggins would be disruptive or disobedient if permitted to remain in the courtroom in his natural unmedicated state. There was further no specific finding that Mr. Riggins would become incompetent to stand trial if not forcibly medicated.

Thus, the infringements upon Mr. Riggins were without legitimate compelling justification. Accordingly, this Court should not sanction the state's interference with the manner in which Mr. Riggins and his counsel chose to defend against the charge and the imposition of a death sentence.

For all these reasons, the National Association of Criminal Defense Lawyers respectfully requests this Court to reverse the judgment of the Supreme Court of Nevada affirming Mr. Riggins' conviction.

Respectfully submitted,

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APPENDIX

The California Death Penalty Defense Manual provides, in pertinent part:

INTRODUCTION: Counsel must recognize the difference between the role of the defense attorney in conducting a guilt phase defense and the role necessary in creating the case for life. Unlike the reactive perspective traditionally associated with "guilt" trials, counsel must approach a capital defense with an "active" perspective. This perspective requires a thorough understanding of counsel's obligations to investigate, prepare, and present a case for life in the penalty phase.

Understanding these obligations begins with a description of what type of evidence qualify as mitigation. As Professor Gary Goodpaster explained:

> First, counsel must portray the defendant as a human being with

> positive qualities. The prosecution will have selectively presented the judge or jury with evidence of defendant's criminal side, portraying him as evil and inhuman, perhaps monstrous. Defense counsel must make use of the fact that few people are thoroughly and one-sidedly evil. Every individual possesses some good qualities and has performed some kind deeds. Defense counsel must, therefore, by presenting positive evidence of the defendant's character and acts, attempt to convince the sentencer that the defendant has redeeming qualities. A true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance.
>
> As the second element of the mitigating case, the defense must attempt to show that the defendant's capital crimes are humanly understandable in light

of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is. Many child abusers, for example, were abused as children. The knowledge that a particular abuser suffered abuse as a child dos not, of course, excuse the conduct, yet it makes the crime, inconceivable to many people, more understandable and evokes at least partial forgiveness. Counsel's demonstration that upbringing and other formative influences may have distorted the defendant's personality or led to his criminal behavior may spark in the sentencer the perspective or compassion conductive to mercy.

(Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases." (1983) 58 N.Y.U. L. Rev. 299, at 335-36, quoted in

People v. Deere, (1985) 41 Cal.3d 353, 366-67).

The phrase "death is different" thus describes both the nature of the punishment and defense counsel's obligation. Simply stated, a capital defendant has the right to present all evidence that "might serve as a basis for a sentence less than death." (**Skipper v. South Carolina**, (1986) 476 U.S. 1, 4-5, quoting **Lockett v. Ohio** (1978) 438 U.S. 586, 605 [plurality opinion]). Indeed, the discovery, development, and presentation of mitigation evidence is limited only by the creativity of counsel.

To "portray the defendant as a human being with positive qualities" and "to show that the defendant's capital crimes are humanly understandable," counsel must conduct an exhaustive investigation of the defendant's background and social

history and make a well-conceived presentation of the mitigation evidence. In presenting the defendant's social history, counsel should be mindful to utilize lay witnesses to document important facts and expert witnesses to interpret that social history. Lay witnesses will include family members, friends, school teachers, probation cfficers, and prison and jail guards. Experts may include sociologists, anthropologists, biologists, chemists, criminalists, pathologists, psychologists, and psychiatrists; indeed, any person who has particular expertise in interpreting the effect of the defendant's background or situation as it relates to the imposition of sentence may testify. Together, these persons can address the impact the cultural, environmental, psychological and physiological factors

have had on the defendant's life, including his criminal behavior. . . .

II. INVESTIGATING THE DEFENDANT'S BACKGROUND AND SOCIAL HISTORY

Preparing the penalty phase requires a thorough and aggressive investigation of the defendant's life and a considered determination of the reasons why the jury should impose a life sentence. (See J. Blum, "Investigation In a Capital Case: Telling the Client's Story," the Champion, at 27 (Aug. 1985)). Successfully building the case for life must begin at the onset of representation. As mitigation evidence is discovered, it should be woven into the overall defense strategy.

> From a preparation standpoint, the mitigation phase makes capital cases the most complex form of criminal trial. It takes excruciating planning to successfully mitigate against the death penalty. An

extraordinary amount of time and effort is a prerequisite to a favorable result.

The source of this complexity is the fact that an effective theory of the case and a defense strategy for either phase of trial cannot be developed until counsel has a good idea of what evidence will be put on, and what procedures will be followed during the entire course of both phases. Strategy for the guilt phase cannot be developed until counsel knows what evidence he will present in the mitigation phase and what procedural limitations will apply. Any inconsistencies or incompatibilities between the defense case in the guilt and mitigation phases can be fatal to the client.

(M. Gleespan, "Mitigation Phase Motions," Ohio Manual, at VIII-I (1986)).

Thus, counsel must ensure that there is a "logical, orderly, and understandable transition" between the guilt, sanity, and penalty phases. (Id).

Counsel must be acutely aware of the important role that the defendant plays in the investigation stage. Without the client's assistance, counsel may be unable to discover valuable mitigation evidence or persuade witnesses to assist the defense. Counsel must be forewarned that a defendant may misinterpret the penalty phase investigation as a sign that the attorney lacks confidence in winning the guilt phase. Thus, counsel should clearly explain the purposes of preparing a strong penalty phase: to uncover information that may assist counsel in securing a fair settlement of the case, discover information that may assist in avoiding a guilt determination, and create the case

for life should the special circumstances be found true.

Every defendant has left a paper trail to his or her jail cell. Immediately upon appointment, counsel should begin collecting all documents and records concerning the client's life. . . . Counsel's goal is to collect every piece of paper bearing the defendant's name, beginning with the defendant's birth certificate and birth medical records. Counsel should then gather all hospital, medical, school, mental health, employment, military, criminal, probation, jail, prison, and parole records, culminating with the defendant's current jail records. From these documents, counsel will obtain the names of numerous potential witnesses that must be interviewed.

After these documents have been gathered and witnesses interviewed, a

social history outline should be prepared. The defendant's social history outline sets forth the significant events that have occurred throughout the defendant's life. The purpose of this document is to provide a guide for understanding how genetic, environmental, psychological, and cultural factors have affected the defendant's personality development and behavior. A complete social history outline can only be created by reviewing the defendant's paper trail and interviewing all significant persons having knowledge of the defendant's life. The outline should start with the defendant's birth and end of his or her pretrial incarceration status. . . . Each entry in the outline should be referenced to the supporting documents or witness statement. In this way, the social history outline also serves as an index to the relevant records and materials that have

been gathered concerning the defendant's life.

After having completed the initial investigation, the defense team should begin planning the penalty phase. By this time, counsel should have acquired a complete mental health profile of the defendant. Counsel should begin this strategy listing all potential mitigation themes. The defense team then must decide which mitigation themes will be presented at the penalty phase. Themes will be considered and reconsidered, and evidence will be evaluated and re-evaluated. In the end, the rejection list may be much longer than the acceptance list. The winnowing of themes and evidence, however, will eventually lead to a consistent and well organized guilt/sanity/penalty phase presentations.

California Public Defender's Association, 1991 California Death Penalty Manual, Chapter 8; at 1-4 Penalty Phase Mitigation, (prepared by James S. Thompson and Michael Lawrence)

Defending Capital Cases in Georgia states, in relevant part:

The objective of the defense at the sentencing phase will almost always be to humanize the person on trial and establish reasons which, while not excusing or justifying the commission of the crime, nevertheless help explain the client's life and provide a basis for a sentence less than death. Counsel should plan a closing argument based primarily on various factors about the life and background of the client. Argue to the jury compelling reasons why in the unique circumstances of your client's life that life imprisonment is sufficient punishment.

Southern Prisoners' Defense Committee, 1987 Defending a Capital Case in Georgia 1009.

Defending a Capital Case in Mississippi, provides, in pertient part:

As previously discussed, the entire purpose of the penalty phase is to convince the jury that your client should not be killed. Jurors find it much easier to vote for the execution of a "criminal" when all they know about him or her are the facts of a terrible crime. It is therefore absolutely critical to humanize the client.

1991 Defending a Capital Case in Mississippi, § B, at 23.

Tools for the Ultimate Trial - The TACDL Death Penalty Defense Manual, provides, in pertinent part:

HUMANIZE THE ACCUSED

It is essential that the jurors be made to see the defendant as a real, multi-faceted human being. A jury is less likely to impose death on a "person" than on a "vicious animal." The process of humanizing a client is best accomplished in subtle ways.

Throughout the trial, counsel should talk about the defendant as a person, not as an object. One technique is to refer to the accused by name, rather than as "the defendant" or "my client." Whenever possible, counsel should talk about the defendant in expansive terms, giving information about background, including personality, poverty, lack of education or sophistication, and the fact

(if it exists) that the accused played a minor role in the planning or execution of the crime.

Body language can tell the jury that counsel thinks of the client as a human being. Whatever comes naturally is what will be most effective. The lawyer may stand behind the client, hands on the client's shoulders, when addressing the jury. Counsel may put a hand on the client's shoulder when talking to the client in the presence of the jury, pat the client on the back, etc. Although this behavior is intentional, it will be effective if - and only if- it is and appears to be sincere. Otherwise, it will seem patronizing at best. The mere fact that the lawyer is seen listening attentively to the defendant can communicate as much to the jury as anything counsel says about his or her feelings for

the accused. Similarly, the entire defense team should be seen treating the accused with respect.

The jury will be watching the defendant throughout the trial, so physical appearance is something to which attention must be paid. Clothing must be consistent with the solemnity of the courtroom, conservative attire that tends to minimize the sordid aspects of the alleged crime. The client should also be encouraged to modify his or her appearance (if necessary) to look more conservative and less threatening to the average juror. Wild, long, or unruly haircuts should be trimmed to a more conservative length and style; facial hair should be trimmed. (Of course, taking this too far may make the jurors think the defendant is trying to fool the identification witnesses).

Another way to humanize a client is to have family members appear before the jury both as witnesses and in showing visible support for the client. An alternative is an attempt to show, through lack of family support, that the individual on trial is a person that "no one cares about."

The defendant's social, educational and work history may be important. Counsel may have to explain how and why the client arrived in the situation that led to the homicide. It may be possible to develop traumatic episodes in the client's life and present them to the jury. Family members may be able to recount meaningful episodes, such as the client witnessing the death of a parent or a violent episode at an early age.

A significant part of this goal may include evidence on the client's mental

and emotional condition. Indeed, this type of evidence may be the focus of the entire sentencing hearing. When presenting evidence of mental condition, however, great care should be taken not to dehumanize the client. The point to emphasize is that many people have psychiatric illnesses; stress and mental illness are not uncommon in today's society. (Beware, however, the jurors' possible reaction that since many people suffer from stress and illness, it is all the more important that they handle it without committing murder).

In presenting these arguments, counsel must take care not to be seen as trying to excuse the defendant's conduct -- a theory that, in addition to being legally insupportable, is not terribly popular.

A related issue may arise when the client has been medicated in order to

achieve competency to stand trial. The medicated client's demeanor and condition should fit the strategy, while respecting the defendant's constitutional right to be present and participate in the trial.

Ake v. Oklahoma, 470 U.S. 68 (1985).

Finally, as discussed in Chapter 9, the accused's personal participation in the trial will give the jury the feeling that the defendant really is a person rather than a thing. The defendant may serve as co-counsel and conduct part of the voir dire or make a short statement to the jury. A more common technique is to have the client testify, at least at the sentencing hearing. The accused may be able to talk (or cry) his or her way out of the electric chair. Genuineness and sincerity are critically important here.

Tennessee Association of Criminal Defense Lawyers, 1987 Tools for the Ultimate Trial, The TACDL Death Penalty Defense Manual, at 10:5-7.

No. 90-8466

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID E. RIGGINS,

Petitioner,

v.

STATE OF NEVADA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FUNDAMENTAL RIGHTS OF EQUALITY OF EX-PATIENTS IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE JUDGMENT BELOW

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QUESTION PRESENTED FOR REVIEW

Whether forced medication at trial of a defendant who has asserted the insanity defense in a capital case violates his right to a full and fair trial under the Sixth and Fourteenth Amendments to the United States Constitution.

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BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FUNDAMENTAL RIGHTS OF EQUALITY OF EX-PATIENTS IN SUPPORT OF PETITIONER AND FOR REVERSAL OF THE JUDGMENT BELOW

I.

STATEMENT OF INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is being filed in support of the Petitioner and his arguments against his drugging at trial and for reversal of the judgment below. This case is of paramount concern to all of the organizations participating in the advocacy of *amicus curiae*, the Coalition for the Fundamental Rights and Equality of Ex-patients ("The Coalition for the Free").[1] Since the issue of involuntary use

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1. The participants in the Coalition for the FREE are as follows:

The NATIONAL MENTAL HEALTH ASSOCIATION ("NMHA") is the nation's oldest and largest non-governmental, citizens' voluntary organization concerned with mental illnesses and mental health. Founded in 1909 by Clifford Beers, a man who suffered from a serious mental illness, the NMHA has historically led efforts on behalf of mentally ill people in institutions and the community. The NMHA has grown into a network of 650 chapters and

of psychotropic drugs first emerged, the Coalition and many of its

state divisions working across the United States. It is composed of volunteers who include family members whose loved ones have been affected by mental illness and former patients. All are committed to advocacy for the improved care and treatment of mentally ill people, the promotion of mental health and the prevention of mental illnesses.

The NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS ("NAPAS") represents agencies established pursuant to the Protection and Advocacy for Mentally Individuals Act of 1986, 42 U.S.C. § 10801, *et seq*. These agencies have the statutory mandate to protect and advocate the rights of persons identified as mentally ill.

PENNSYLVANIA PROTECTION AND ADVOCACY, INC. ("PP&A") is the federal protection and advocacy agency in Pennsylvania for persons diagnosed as mentally ill pursuant to 42 U.S.C.A. § 10801 *et seq*. PP&A has represented persons who were being drugged while on trial, including persons raising the insanity defense. PP&A has been *amici* in numerous cases, most recently, *Sullivan* v. *Zebley*, 493 U.S. 521 (1990).

The NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE ("New Jersey Public Advocate"), through its DIVISION OF MENTAL HEALTH ADVOCACY ("DMHA"), is a cabinet-level state agency that has represented psychiatric patients for 17 years in a wide range of matters including civil commitment and medication refusal, pursuant to enabling legislation, N.J.S.A. 52:27E-21 through 27. The New Jersey Public Advocate is the federal protection and advocacy Agency in New Jersey under 42 U.S.C.A. 10801 *et seq*. DMHA represented the plaintiff class in *Rennie* v. *Klein*, 720 F. 2d 266 (3d Cir. 1983), one of the first cases to determine the right of psychiatric patients to refuse psychotropic medication. DMHA has filed numerous *amici* briefs on issues related to patients' rights, mental health advocacy, and the "right to refuse" drugging. *See, e.g.*, brief *amici curiae* in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985) and the proposed brief *amicus curiae* in *Mills* v. *Rogers*, 457 U.S. 291 (1982).

The MENTAL HEALTH CONSUMERS' NATIONAL LEGAL DEFENSE AND EDUCATION PROJECT was organized by consumers in Philadelphia, Pennsylvania in 1988 to provide technical assistance, research and training to mental health consumers and their advocates on legal and policy issues involving mental illness and

members have previously been involved in similar "right to refuse" drugging cases in federal and state courts across the country,[2] as well as in "right to refuse" issues before this Court.[3]

Many of the members of the Coalition's constituent groups are themselves mental health consumers who have had their own experiences with the drug involved here and other similar drugs, including drugging during trial proceedings. Many of the other Coalition members are family members and advocates for persons involved in issues related to forced druggings. Because of the Coalition's long-demonstrated concern about the issues related to forced drugging throughout our society, particularly where an individual who has been diagnosed with mental illness is raising the insanity defense in a capital case, the Coalition has a strong interest in participating as *amicus curiae* in this case.

consumers' rights and to assist consumers with access to the courts, legislatures and agencies on matters affecting their lives as consumers of mental health services.

The MENTAL HEALTH PATIENT'S ASSOCIATION OF NEW JERSEY, established in 1984, is a statewide network of individuals and self-help organizations devoted to the development of self-help and advocacy groups and the protection of the interests and rights of mental health consumers.

The MENTAL PATIENTS' ASSOCIATION OF PHILADELPHIA was formed in 1985 in an effort to organize mental health consumers to oppose all efforts to erode the rights and freedoms of those who have been hospitalized for psychiatric illness and to call for an end to discrimination against the psychiatrically disabled in any form.

2. *See, e.g.*, the briefs *amicus curiae* filed by the Coalition in *Riese* v. *St. Mary's Hosp. & Medical Center*, 196 Cal. App. 3d 1388, 243 Cal. Rptr. 241 (1987) and by members of the Coalition in *Jones* v. *Gerhardstein*, 114 Wis.2d 710, 416 N.W. 2d 883 (1987) and, previously, the representation of the plaintiff class by the New Jersey Public Advocate throughout the case of *Rennie* v. *Klein*, 720 F. 2d 266 (3d Cir. 1983) (*en banc*)

3. *See, e.g.* the briefs *amicus curiae* of the Coalition and that of the New Jersey Public Advocate, separately, in *Washington* v. *Harper*, 494 U.S. 210 (1990) and, together, in *Perry* v. *Louisiana*, 111 S. Ct. 449 (1990)

II.

SUMMARY OF ARGUMENT

Sedation and suppression of emotion are the known, intended effects of Mellaril, the medication used to drug the Petitioner in this case. These known, intended effects of Mellaril combined with the stress of trial, altered his demeanor and behavior so that he appeared sedated and emotionless. These effects of the forced drugging are precisely the reasons that such drugging of defendants during trial violate their constitutional rights to a fair trial and to confront the witnesses against them under the Sixth Amendment and to due process of law under the Fourteenth Amendment. III. A.

Mellaril and other psychotropics are powerful, intrusive and potentially dangerous drugs which should only be used during trial when proven to be absolutely necessary in order to protect the defendant or others. Here, there was no constitutional justification for continuing the involuntary drugging of Petitioner during trial. III. B.

Forced drugging interfered with the Petitioner's ability to mount an effective defense because the jury was not permitted to see his natural, unmedicated demeanor. III. C.

III.

ARGUMENT

A. Because of Its Known, Intended Effects, Involuntary Drugging During Trial Interfered with Petitioner's Constitutional Right To Confrontation.

1. *The Known, Intended Effects of Mellaril Were to Sedate Petitioner and Deaden His Emotions.*

This case is unusual in that, first and foremost, Petitioner's "right to refuse" claim focuses as much on the well known, intended and clearly predictable effects of the drug involved

here,[4] as on the potentially harmful "side" effects which are usually the focus of such claims.[5] In his Motion to Terminate Administration of Medication, dated June 10, 1988,[6] Mr. Riggins pointedly objected to the very effects for which Mellaril is most noted: sedation and loss of affect or emotion. At trial, he denied that the drug helped him to understand what was happening at the trial. R. 742. Significantly, at trial, Mr. Riggins was receiving the maximum dose of Mellaril, 800 mg.[7]

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4. The effects of Mellaril (generic name thioridazine) are described as follows in the standard drug reference work:

> Mellaril (Thioridazine) is effective in reducing excitement, hypermotility, abnormal initiative, affective tension and agitation through its inhibitory effect on psychomotor functions. *Physicians' Desk Reference* 1951 (45th Ed. 1991) (hereinafter "PDR").

5. *See, e.g. Mills* v. *Rogers*, 457 U.S. 291, 293 n. 1 (1982); *Washington* v. *Harper*, 494 U.S. 210 229 (1990).

6. Record on Appeal (hereinafter "R.") at 52.

7. Because of its documented, dangerous side effects (Part III B below) the highest recommended dose of Mellaril is 800 mg. R. 415, 473 ("Eight hundred a day is — well, that's a pretty high dose"). *See* Lindsay, DeVane, Williams and Wilkins, *Fundamentals for Monitoring Psychoactive Drugs* 377 (1990). ("A ceiling dose of 800 mg has been established to minimize the possibility of pigmentary retinopathy. Thioridazine is notable for a high frequency of cardiac effects"). Despite the testimony before the Court that tolerance develops for such high doses, R.473, it is undisputed in psychopharmacological studies that tolerance does *not* develop for Mellaril and other similar drugs. *See* Goudie & Emmett, *Psycholactive Drugs: Tolerance and Sensitization* 375 (1989) (tolerance is "rarely observed in relation to antipsychotic effects"); Perry, Alexander, & Liskow, *Psychotropic Drug Handbook* 5 (1985) ("Tolerance does not develop to the therapeutic effects of antipsychotics"). Nor is there any pharmacological evidence to support the supposed increase in tolerance to Mellaril due to Petitioner's alleged cocaine use. (R. 473) *See, e.g.* World Health Organization, *Adverse Health Consequences of Cocaine Abuse*, 22 (Aris. ed.) (1987); Spitz & Rosencan, *Cocaine Abuse* 265-266 (1987); Spotts & Shontz, *Cocaine Users* 15-19 (1980).

Riggins' symptoms, which included auditory hallucinations (hearing voices), and diagnosis are those of a classic case of schizophrenia.[8] Given his illness, once the decision was made to drug Petitioner, any competent medical professional could have readily foreseen the sedative effects of the drugging on his demeanor, attention and attitude. R. 419-20, 445-446, 474-75. The sedative effects of Mellaril—even absent the added effects of stress of trial—have long been documented in pharmacological texts. Because of the soporific effects of Mellaril, the PDR cautions patients against participating in activities requiring complete mental alertness such as driving. Prescribers are advised to administer Mellaril cautiously.[9]

Finally, the drug's intended "calming" effects have been described in terms that are particularly relevant here regarding Mr. Riggins' demeanor at trial:

> The hostile patient, unreceptive to previous therapy, became *more quiet, more tolerant and less demanding* . . . . The capacity of Thioridazine to suppress the symptoms of schizophrenia was reflected in the prototype of a *calm, obedient, well-behaved and manageable patient.*[10]

Indeed, in some of the leading comparative studies of common psychotropics, the research has demonstrated Mellaril's particular efficacy in regard to sedation; Mellaril is "most likely to produce

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8. *See* Torrey, *Surviving Schizophrenia* at 2, 6 (1983); *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. rev. 1987) ("DSM-III-R"), at 194 (diagnostic criteria for schizophrenia); Grebb & Cancro, "Schizophrenia: Clinical Features," in *Comprehensive Textbook of Psychiatry* 757, 761 (5th ed. 1989)

9. The PDR notes that Mellaril's basic pharmacological activity is similar to that of other phenothiazines, which researchers have described as having "a high incidence of sedation, orthostatic hypotension and anticholinergic side effects." Mendel, *Treating Schizophrenia* 166 (1989)

10. Leger, "A Four Year Appraisal of Thioridazine," 123 *Am. J. Psych.* 728, 729-730, 732 (1966) (emphasis added).

sedation and postural hypotension . . . In fact, the *marked sedation* often produced by chlorpromazine and *thioridazine* limits the practical dosage . . ."[11] Other leading commentators and researchers have long documented the sedative effects of Mellaril and related drugs.[12]

Morever, Mellaril's sedative properties also interfere with the day-to-day intellectual and cognitive performance of its recipients.[13] This deterioration has been observed with Mellaril and other drugs in its class.[14]

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11. Klein, Gittelman, Quitkin and Rifkin, *Diagnosis and Drug Treatment of Psychiatric Disorders* 149 (1980) (emphasis added).

12. *See*, Gillies and Lader, *Guide to the Use of Psychotropic Drugs* 495 (1986) ("In psychiatry thioridazine is used as: A sedative antipsychotic in schizophrenia . . ."); Iversen & Iversen, *Behavioral Pharmacology* 250 (1975) ("Although the sedative effects of the phenothiazines are their most dramatic behavioral effect, it is doubtful if their antipsychotic actions depends on sedation."); Rosenzweig & Griscom, *Psychopharmacology and Psychotherapy* 127 (1978) ("They all have sedative properties but sedation and antipsychotic action are not related, and in some patients sedation may be an undesirable side effect. . . . [A]ntipsychotic action is unrelated to sedation or anti-anxiety properties. . ."); Carlton, *A Primer of Behavioral Pharmacology* 198 (1983) ("The major secondary effects . . are . . . : 1. Sedative . . .").

13. Thus the Thioridazine [Mellaril] subjects demonstrate a lower level of task knowledge and are less consistent than either of the other drug groups [Haloperidol (Haldol) and Trifluoperazine (Stelazine)]. The cumulative effects of these deficiencies result in their overall performance impairment . . . Thioridazine patients, however, actually evidenced deterioration in performance after feedback had been provided in two of three experimental tasks. Gillis, "The Effects of Selected Antipsychotic Drugs on Human Judgment," 21 *Current Therapeutic Research* 224, 231 (1977)

14. "The apparent loss of behavioral response with phenothiazines, therefore, seems to be due to a loss of response to certain controlling stimuli in the environment." Iversen & Iversen, *Behavioral Pharmacology* 248 (1975).

Clearly then, drugging with such a powerful sedative affected—and was affected by—the Petitioner's ability to deal with the stressful interactions inherent in a trial situation, especially a capital trial. The research demonstrates that the effects of psychotropic drugging are, in turn, affected by the environment in which the drugging occurs, and are particularly affected by stress.[15]

There can be little doubt that a capital trial is highly stressful and, thereby, produces a psychological reaction that alters responses to drugging. Thus, the already powerful sedative and other emotion deadening effects of the drugs may have actually been intensified during the crucial "confrontation" phase of Mr. Riggins' trial proceedings. The primary intended result of the drugging—

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15. Conditions of stress... alter the physiological state of the organism, affecting hormonal balances and central nervous system functioning. *Thus it follows that drug responses should also be altered by stress* .... That is, stimulus conditions perceived as uncomfortable or dangerous can result in individual homeostatic changes. *Stress may cause profound central and peripheral changes which are not always adaptive.* Hypoxia, hypothermia, exercise, and *psychological stress* all cause activation of the sympathetic nervous system and bring about "stress hypoglycemia", in which glucose metabolism is changed and insulin secretion inhibited by epinephrine. Since the CNS itself is not sensitive to insulin, it utilizes the available glucose. So these changes in insulin regulation and glucose metabolism underlie certain altered responses to drugs during stress.

"Drugs and Social Behavior" in *Psychoactive Drugs and Social Judgment* 25 (Hammond & Joyce, eds. 1975) (emphasis added). *See also, Handbook of Stress: Theoretical and Clinical Aspects*, at 340-45 (Goldberg & Breznitz, eds. 1983). *See also*, Cameron & Wisner, "An Anticholinergic Toxicity Reaction to Chlorpromazine Activitated by Psychological Stress," 167 *J. Nervous & Mental Disorders* 508 (1979).

Before this Court, *Amicus* and its members have long noted the impact of stress on the effects of these drugs. *See, e.g.*, Brief *amicus curiae* of the Coalition for the FREE in *Perry* v. *Louisiana*, 111 S. Ct. 449 (1990), at 12, n.9 and the Brief *amicus curiae* of the New Jersey Department of the Public Advocate in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), at 52, n. 41.

sedation—tends to defeat the Petitioner's interests in being present and involved at his own trial.

2. *The Involuntary Drugging Interfered with Petitioner's Confrontation Clause Rights*

This Court has twice recently examined the nature of the accused's right to confront his accusers in *Coy* v. *Iowa*, 487 U.S. 1012 (1988) and *Maryland* v. *Craig*, ___U.S. ___, 110 S. Ct. 3157 (1990). In both cases, the Court has rejected the view that the Confrontation Clause of the Sixth Amendment involves only a mere guarantee of the right to cross-examination.[16] As the Court noted in *Coy*; 487 U.S. at 1019:

> The thesis is on its face implausible, if only because the phrase "be confronted with the witnesses against him" is an exceedingly strange way to express a guarantee of nothing more than cross-examination.

Similarly, the Court noted in *Craig*, 110 S. Ct. at 3166:

> [W]e are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of the other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing...

Clearly then, the "face-to-face" component of the confrontation is a *two*-way process—absent special considerations as in *Craig*. True confrontation necessarily involves both the face of the witness *and* that of the accused. Thus, the Court in *Coy* speaks of the difficulty of a witness lying about a person "to his face" or that a "witness' may feel quite differently when he has to repeat his story *looking at the man* whom he will harm..." *Coy*, 487 U.S. at 1019. (emphasis added)[17]

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16. *See* Dean Griswold's similar views in Griswold, "The Due Process Revolution and Confrontation," 199 *U. Pa. L. Rev.* 711 (1971).

17. These current analyses also parallel the Court's earlier expansive view of the Confrontation Clause in the context of out-of-court statements:

Implicit in all of this described interaction among witness, accused and jury is the plain-but "subtle effect" — that the witness and the jury both can observe the *accused's* reaction to his accuser. Thus, quite apart from the separate due process issues raised by the effects of the drugging on the accused (see Part III B below), here interference with confrontation arises from the fact that the drugging dulled *both* Mr. Riggins' appearance to the testifying witnesses and jury *and* "dampened," *see* n. 50 below, his reactions to the witnesses at trial.

The drugging also rendered Riggens effectively "absent" — over his objection — from the courtroom in contravention of the constitutional right to be present at one's trial.[18] The Sixth and Fourteenth Amendments guarantee a defendant the right to be present throughout his trial. *Illinois* v. *Allen*, 397 U.S. 337, 346 (1970). In *Illinois* v. *Allen*, where the defendant had disrupted his trial, this Court noted that "courts must indulge every reasonable presumption against the loss of constitutional rights," and held that a defendant may lose the right to be present only if he "insists on

> [T]he accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Mattox* v. *United States*, 156 U.S. 237, 242-3 (1885)

See also Dowdell v. *United States*, 221 U.S. 325, 330 (1911) (regarding a similar clause in the Philippine Bill of Rights was intended "to secure the accused the right to be tried, so far as facts provable by witnesses are concerned, by only such witnesses as meet *him* face to face at the trial, who give their testimony in *his* presence . . .") (emphasis added).

18. Here, the defendant's absence was involuntary; the court denied his Motion to Terminate Administration of Medication after a truncated review. *Cf. Diaz* v. *United States*, 223 U.S. 442 (1912) (defendant's "voluntary" absence not grounds for finding a violation of the Confrontation Clause).

conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. at 343 (footnote omitted).

In *Illinois* v. *Allen*, this Court suggested three constitutionally permissible ways to handle an obstreperous defendant: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." This Court held that courts are not required to try defendants in shackles.[19]

Here, eighteen years after *Illinois* v. *Allen*, the defendant's "shackling" and "gagging" was accomplished by means of drugging rather than by the more obvious, physical means used on Allen.[20] Nonetheless, there were likely "significant feelings" related to the jury's seeing the chemically restrained

19. Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that *no person should be tried while shackled and gagged except as a last resort.* Not only is it possible that the sight of shackles and gags might have a *significant effect on the jury's feelings about the defendant*, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. *Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.*

Illinois v. *Allen*, 397 U.S. at 343-344 (emphasis added).

20. Foreshadowing this case, in his opinion in *Illinois* v. *Allen*, 397 U.S. at 356-57, Justice Douglas concluded: "The case presented here . . . involves a defendant who was a sick person and who may or may not have been insane in the classical sense, but who apparently had a diseased mind." Justice Douglas noted Allen's initial finding of incompetence to stand trial and his history of mental hospitalization. *Id.* at 357, n. 5.

defendant, just as the Court predicted in the "visible restraint" situation described in *Illinois*. It is no exaggeration that Mellaril and other similar psychotropic drugs are commonly referred to as "chemical restraints" — and worse.[21]

Applying *Illinois* v. *Allen* to the case at hand, it is clear that the Petitioner here is entitled to the reasonable presumption against the loss of his constitutional right to be present at his trial, without any restraints, either physical or chemical in nature. *In Illinois* v. *Allen*, 397 U.S. at 341, 342, Allen had repeatedly and purportedly deliberately attempted to disrupt the proceedings against him. Here, Riggins never had the opportunity to appear in court in his natural, unmedicated state; he was chemically restrained throughout the trial. Thus, there is no evidence that he was disruptive. There is only a pair of half-hearted predictions of possible deterioration and obstruction by one psychiatrist who testified at trial. R. 753, 762. Speculation alone is clearly an inadequate basis to justify depriving petitioner of his right to be present at his trial and to confront the witnesses against him. Moreover, this is hardly an adequate explanation to the jury for denial of Petitioner's right to confrontation. Further, Mr. Riggins' mental illness was not typically characterized by loud or disruptive behavior. R. 595, 653, 656.

The Sixth Amendment surely includes the right to freely interact with one's counsel during the testimony of adverse witnesses. In *Maryland* v. *Craig*, this Court specifically noted the importance of this subtle aspect of confrontation, the right to interact with one's

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21. See Sovner, "Behavioral Psychopharmacology Update" 9 *Habilitative Mental Healthcare Newsletter* 34, 35 (1990) ("chemical restraint (*the way thioridazine [Mellaril] is*") (emphasis added). *See also*, Horton "Restoration of Competency for Execution: *Furiosus Solo Furore Punitur*," 44 *Sw. L.J.* 1191, 1204 (1990) (psychotropic drugs described as "a chemical straitjacket") *See, e.g.*, Ferleger "Loosing the Chains: In-Hospital Civil Liberties of Mental Patients," 13 *Santa Clara Law.* 447 (1973); Plotkin & Riging, "Invisible Manacles: Drugging mentally retarded people." 31 *Stanford L. Rev.* 637 (1979).

lawyer during the trial.[22] In holding that testimony by closed circuit television by a child may be permissible, this Court noted that the "defendant retains full opportunity for contemporaneous cross-examination." 110 S. Ct. at 3166.[23] In *Craig*, the defendant remained in electronic communication with his attorney, and was thus able to assist in cross-examination. 110 S. Ct. at 3161. As part of the Confrontation Clause requirement that the defense be given a full and fair opportunity to probe and expose testimonial infirmities, 110 S. Ct. at 3164, defendant must have the opportunity to communicate with his attorney throughout the trial. If a defendant is sedated as a result of forced drugging, it may be impossible for him to be alert during the trial and therefore he may be unable to consult with his attorney during the examination of witnesses. Surely, given the soporific effects of Mellaril, drugging Mr. Riggins with a high dose of Mellaril during trial was, in effect, "placing a sustained barrier to communicate between ... defendant and his lawyer." *Geders* v. *United States*, 425 U.S. 80, 91 (1976); *cf. Perry* v. *Leeke*, 468 U.S. 272 (1989).

The Confrontation Clause also involves the defendant's observation of the *witnesses'* demeanor and his reactions to their cross-examination. *California* v. *Green*, 399 U.S. 149, 158 (1970).[24]

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22. Earlier, in *Coy*, it is not clear from the opinion where the defendant's counsel was positioned relative to the "large screen . . . placed between appellant and the witness stand . . ." *Coy* v. *Iowa*, 487 U.S. at 104. However, the Iowa statute specifically addressed the issue: "[T]he court shall take measures to insure that the party and counsel can confer during the testimony . . ." Iowa Code §910A.14 (1987)). Nonetheless, this Court found that the use of a screen violated the defendant's rights under the Confrontation Clause. *Coy*, 487 U.S. at 1022.

23. *Craig* itself has been criticized for not dealing adequately enough with the interference to communication with counsel under the Maryland television scheme. *See, e.g.*, Schwalb, "Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining 'Confrontation' to Protect Both Children and Defendants," 26 *Harv. Civ. Rights & Civ. Liberties L. Rev.* 189, 202-204 (1991).

24. One possible source for the Confrontation Clause is in the 1696 trial of Sir John Fenwick. There, the court stated:

Here, Mr. Riggins was not able to react normally to the witnesses' testimony because of the sedating influence of Mellaril. Here we, too, as Justice Scalia noted in *Coy*, have no way of knowing "whether the witnesses' testimony would have been unchanged, or the jury's assessment unaltered ..." *Coy* v. *Iowa*, 108 S. Ct. at 2803. The Petitioner's drugged "presence," much like his total absence or actual physical shackling and gagging, unalterably skewed the reactions of the other participants in the trial process.

B. There Was No Constitutional Justification for Involuntarily Drugging Petitioner During Trial

1. *Because of the Powerful and Potentially Dangerous Side Effects of These Drugs, Petitioner Should Have Been Given Every Opportunity to Avoid Being Drugged At Trial.*

When the trial judge denied Petitioner's Motion to Terminate Administration of Medication, he permitted continuation of psychotropic drugging that was fraught with peril for Riggins. All the most current research on Mellaril confirms that even "low" doses of this drug are capable of causing irreversible harm and a wide variety of bodily organic and systemic effects including cardiac,[25]

> "Our law requires persons to appear and give their testimony 'viva voce'; and we see that their testimony appears credible or not by their very countenances and the manner of their delivery; and their falsity may sometimes be discovered by questions that *the party may ask them* . . ." Proceedings Against Sir John Fenwick, 13 How. St. Tr. 537, 591-92 638 (1696) in 5 *The Founders' Constitution* 247 (Kurland & Lerner 1987).

Note, "Eighth Circuit Applies the Confrontation Clause at a Sentencing Hearing," 17 *Wm. Mitchell L. Rev.* 829, 832-3, n.16 (1990) (emphasis added).

25. Wilens & Stern, "Ventricular Tachycardia Associated with Desipramine and Thioridazine," 31 *Psychosomatics* 100 (1990).

renal,[26] vision,[27] excretory,[28] and other dysfunctions, as well as disabling conditions, such as tardive dyskinesia, dystonia, and, neuroleptic malignant syndrome.[29] This newer research merely confirms what has been known about the drug's side effects almost since the first introduction and adoption of Mellaril in 1959 as a symptom suppressing agent.[30]

Current research demonstrates that by themselves, even low dosages and short terms of Mellaril treatment or even drug treatment withdrawal are no protection from the risks of serious disabling, even disfiguring and stigmatizing side effects.[31] Lest these

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26. Urberg, "Thioridazine-Induced Non-Icteric Hepatotoxicity," 30 *J. Fam. Prac.* 342 (1990).

27. Ball & Caroff, "Retinopathy, Tardive Dyskinesia and Thioridazine," 143 *Am. J. Psych.* 256 (1986).

28. Ananth & Lin, "SIADH: A Serious Side Effect of Psychotropic Drugs," 16 *Int'l J. Psych. Med.* 401 (1987) .

29. Zammit & Sullivan, "Thioridazine and Neuroleptic Malignant Syndrome," 22 *Biol. Psych.* 1296 (1987) (letter); Moore, MacFarlane & Blumhardt, "Neuroleptic Malignant Syndrome," 53 *J. of Neurology, Neurosurgery, & Psych.* 517 (1990)

30. *See, e.g.* Kelly, Fay & Laverty, "Thioridazine Hydrochloride (Mellaril): Its Effect on the Electrocardiogram and a Report of Two Fatalities with Electrocardiographic Abnormalities," 89 *Can. Med. A.J.* 546 (1963). *But see* Wendkos,"Thioridazine and Electrocardiographic Abnormalities," 89 *Can. Med. A.J.* 1297 (1963). For other early warnings about this drug, *see also* Barancik, Brandborg & Albion,"Thioridazine-Induced Cholestosis," 200 *JAMA* 69 (1967); Davidorf, Thioridazine Pigmentary Retinopathy," 90 *Arch. Opthalmol.* 251 (1973); Kotin, Wilberg, Verbert & Solinger,"Thioridazine and Sexual Dysfunction," 133 *Am. J. Psych.* 82 (1976); Haberman, "Malignant Hypothermia: An Allergic Reaction to Thioridazine Therapy," 138 *Arch. Internal Med.* 800 (1978); Hussain & Murphy,"Thioridazine-induced toxic psychosis," 104 *Can Med. A.J.* 884 (1971); Rothstein,"Allergic Reactions to Thioridazine," 290 *N. Eng. J. Med.* 521 (1974); Gonzalez,"Disadvantages of Prescribing Thioridazine," 138 *Am. J. Psych.* 1131 (1981)

31. *See* Giron, "Tardive Dystonia after a short course of Thioridazine," 34 *J. Fam. Prac.* 405 (1987); Koschlo, Dolor & Lipper, "Delayed Onset of Neuroleptic Malignant Syndrome after Discontinuation of Thioridazine," 10 *J. Clinical Psychopharmacology* 146 (1990), Hitri, Carter,

aspects of Mellaril appear to be idiosyncratic to this drug, they only differ slightly in kind or degree from the effects equally well known and documented side of the other phenothiazine drugs of the same "family" as Mellaril.[32] Indeed, it is *just* these disabling, stigmatizing side effects and questions about efficacy[33] that have resulted in the widespread demand for access to newer, alternative drugs by mental health consumers, their families and advocates.[34]

Shoh, Borison & Diamond, "Neuroleptic Blood Levels and Tardive Dyskinesia," in *Chronic Treatments in Neuropsychiatry* (1985).

32. *See, e.g.*, Alexander, "Cardiotoxic Effects of Phenothiazine and Related Drugs," 38 *Circulation* 1014 (1968); Leetsma & Koening "Sudden Death and Phenothiazine," 18 *Arch. Gen. Psych.* 137, 147 (1968) ("Recent experimental work indicates that the phenothizines (Thioridazine and to a lesser extent Chlorpromazine) have many potent and often unpredictable actions on the cardiovascular system, that many of the cases of sudden unexplained deaths have apparently died cardiovascular deaths ... The authors feel there is a real entity of sudden death caused by phenothizines").

33. One researcher cautioned those administering these drugs:

> After decades of pharmocokinetic and pharmacodynamic research, the therapeutic outcome of neuroleptic treatment *is still largely unpredictable in the individual* case. While most patients respond rapidly to carefully controlled and individually adjusted dose and serum drug concentrations, some require considerably longer treatment periods for complete recovery and others improve only partially or not at all. A symptom that is efficiently erased in one patient may thus resist optimal treatment with the same neuroleptic drug in another case.

Axelsson & Ohman, "Patterns of response to neuroleptic treatment: Factors influencing the amelioration of individual symptoms in psychotic patients," 76 *Acta Psych. Scand.* 107 (1987)

34. *See, e.g.* Blackburn, "New Directions in Mental Health Advocacy? Clozapine and the Right of Medical Self- Determination" 14 *ABA Mental & Physical Disability L. Rep.* 453 (1990); Green & Salzman "Clozapine: Benefits and Risks," 41 *Hospital & Community Psych.* 379 (1990); Winslow, "Courts Consider Schizophrenia Drugs Access," *Wall St. J.*, B1 (Oct. 5, 1990).

2. *Any "Balancing" of Interests Here Favors Petitioner's Interest in Not Being Involuntarily Drugged at Trial*

In this Court's recent opinion on forced drugging of prisoners, *Washington* v. *Harper*, 494 U.S. 210 (1990), this Court applied a balancing test and balanced the prisoner's liberty interest in not being drugged as against the state's interest in combating the danger posed to himself and others by a violent, mentally ill inmate under the "reasonable relation" test of *Turner* v. *Salfey*, 483 U.S. 78 (1987). The Court held:

> We hold that, given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, *if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.*

494 U.S. at 225-27 (emphasis added, citations omitted). Here, there was no evidence that Riggins was dangerous to himself or others at the time of trial. Therefore, Riggins' liberty interest in not being drugged outweighs the State's interest in drugging him.

Given the foregoing analyses of the known, intended effects of Mellaril (Part III A) as well as the unintended, "side" effects of the drug (Part III B 1), in order to justify drugging there must first be at least a showing that Mr. Riggins' "medical treatment needs" required the drugging. As one leading federal court noted, however:

> Medical treatment is designed to ensure that the condition of pretrial detention does not amount to the imposition of punishment. This constitutional requirement cannot be turned on its head to mean that if a competent individual chooses not to undertake the rules and pain of *potentially dangerous* treatment, the jail may force him to accept it. ... [A]lthough the state undoubtedly has *an interest in bringing to trial those accused of a crime*, we question whether this interest could ever be deemed sufficiently compelling to outweigh a

> criminal defendant's interest in not being forcibly medicated with antipsychotic drugs.... Bee does not dispute that forcible medication with antipsychotic drugs may be required in an emergency. *Absent an emergency*, we do not believe forcible medication with antipsychotic drugs is "reasonably related" to the concededly legitimate goals of jail safety and security. *Bee* v. *Greaves*, 744 F.2d 1387, 1395 (10th Cir. 1984) *cert. denied*, 469 U.S. 1214 (1985) (emphasis added).

See also, Large v. *Superior*, 714 P.2d 399, 408 (Ariz. 1986) ("forcible medication with dangerous drugs should be limited to specific emergencies under procedural safeguards").

The apparently conflicting opinion in *United States* v. *Charters, 863 F.2d 302 (4th Cir. 1988) (en banc), cert. denied*, 110 S. Ct. 1317 (1990), simply does not control a case such as that presented here. First — and foremost — Charters was *not* medicated at the time of the elaborate review process outlined in *Charters*, 863 F.2d at 304, 305,[35] whereas here Riggins was medicated even *before* the inverted, post-hoc judicial hearing on the drugging. Because of his ongoing drugging, there was simply no evidentiary basis — other than pure psychiatric speculation — for finding that Riggins was potentially incompetent or disruptive, or in any other disabling or dangerous condition *without* a termination of his drugging. Indeed, Dr. Quass, the only psychiatrist to see Riggins in an undrugged condition, testified that he was competent without the drugging. R. 443, 449-50. That fact alone should have justified granting Riggins' Motion to Terminate Administration of Medication.

Without that "drug holiday," the trial court turned *Charters* on its head by holding its hearing *after* the drugging, and its intended

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35. *See also Application for a Stay in Charters* v. *United States, stay granted*, (A. 88-628) 57 U.S.L.W. 3545 (U.S. Feb. 14, 1989), at 1 and Petition for Certiorari (No. 88-6525) (Mar. 5, 1990) in *Charters* v. *United States, cert. denied*, 110 S. Ct. 1317 (1990).

sedation and other effects, were already taking place. Nothing in *Charters* justifies that bizarre result. Indeed, none of the leading cases and authorities on the proposition seem to countenance allowing the drugging to proceed *before* whatever process is due. *See In re Pray*, 133 Vt. 253, 336 A.2d 174, 177 (1975) ("In fact, it may well have been necessary... to expose the jury to the undrugged, unsedated [defendant] at least insofar as safety and trial progress might permit"); *State* v. *Maryott*, 6 Wash. App. 96, 492 P.2d 239, 243 (1971) ("[N]o control should be imposed until its need has been demonstrated....").

Thus, there is simply no authority in *Harper, Charters* or *Bee* or any of the leading state cases for the inverted, post hoc procedure followed here. None of the psychiatric predictions of dangerousness[36] — prophesies of "doom in the courtroom" — can justify the continued drugging over Mr. Riggins' desire to proceed unmedicated, particularly in this truly life or death setting.[37] As this Court noted in *Gardner* v. *Florida*, 430 U.S. 349, 357 (1977) "death is a different kind of punishment from any other which may be imposed in this country."

The insanity defense imposes a unique set of different issues on trials, courts and advocates involved in cases where it has been raised.[38] With both "different" aspects involved here, the balancing of Riggins' interest in not being medicated during his capital trial

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36. *See*, as to the imprecision of such predictions, Ennis & Litwack, "Psychiatry and the Presumption of Expertise," Flipping Coins in the Courtroom," 62 *Calif. L. Rev.* 693 (1974); Slobogin, "Dangerousness and Expertise" 133 *U. Pa. L. Rev.* 97 (1984).

37. *See* Part III A above, regarding the need for a justification for restraint under *Illinois* v. *Allen*; Poythress & Stoch, "Competency to Stand Trial: A Historical Review and Some New Data," 8 *J. Psych. & L.* 131 (1980).

38. *See, e.g.*, Perlin, "Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence," 40 *Case W. Res. L. Rev.* 599, 721 (1990).

surely takes on some of the characteristics as well of *Perry* v. *Louisiana*, U.S. , 111 S. Ct. 449 (1990), last Term's death row "right to refuse" case.[39] Here, as in *Perry*, the State's interest in drugging Riggins—is hardly a truly "healthy" interest in his long-term welfare. Here the State's current interest in Riggins is but one level removed from Louisiana's fatal "interest" in *Perry*. If Riggins' conviction and sentencing while being drugged withstands this appeal, the ultimate issue will then become that of drugging on death row, as in *Perry*.

The balancing here seems just as clear as in *Perry:* there can be no continuation of drugging without a proper justification of medical necessity. In *Harper* that justification turned on "whether the inmate suffers from a "mental disorder"; and second, whether, as a result of that disorder, he is dangerous to himself, others or their property." *Harper*, 110 S. Ct. at 1042. Here, before trial there was no proof of *any* current propensity toward dangerousness[40] and little, if any, evidence of any current mental disorder other than some-months-old past history. Using the *Harper* analysis therefore,

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39. On remand, *Perry* v. *Louisiana* has recently been granted review by the Supreme Court of Louisiana, where again the issue is whether the State's interest in executing him overrides his right to refuse. "The State has admitted in this case that the sole purpose of seeking to medicate Michael is to execute him." Original Application on Behalf of Michael Owen Perry, *State of Louisiana* v. *Michael Owen Perry*, (La. Sup. Ct., June 10, 1991), (No. 91KP1324) at 25; *rev. granted*, (Sept. 20, 1991). Argument has been scheduled for Dec. 5, 1991.

40. For once, all of the usual sly suggestions by prosecutors of defendant's possibly "faking" mental illness turn against the State in this context. *See, e.g.*, R. 724. If Mr. Riggins were "faking" mental illness, then he stood a better chance of being detected if he had *not* been receiving large doses of Mellaril. *See, generally:* Perlin, *supra n.* 38, 40 *Case W. Res. L. Rev.* at 713-720. *See also*, for some background on similar claims of "faking," Geller, Erlen, Kaye & Fisher, "Feigned Insanity in Ninteenth-Century America: Tactics, Trials and Truth," 8 *Beh. Sci. & L.* 3 (1990)

in the absence of any proof of current mental illness[41] and of dangerous acts, Mr. Riggins should have been permitted to "Just Say 'No'" and then been allowed to proceed to trial without the drugging he sought to refuse. Only if trial were demonstrated not to be possible without disruption, could the trial court then proceed with its analysis under *Illinois* v. *Allen*.[42]

In *Washington* v. *Harper*, this Court made clear that "some kind of hearing" on the issue was due before even a *convicted and sentenced* prisoner was forcibly drugged with psychotropic medication. 494 U.S. at 228. The guiding standard to be applied in such process required under *Harper* was whether the prisoner was a danger to himself or others in the prison setting. That holding was consistent with the Court's earlier holding touching on this issue in *Vitek* v. *Jones*, 445 U.S. 480 (1980)[43] and with other courts that have

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41. *See, generally*, Fentiman, "Whose Right Is It Anyway? Rethinking Competence to Stand Trial In Light of the Synthetically Sane Insanity Defendant," 40 *U. Miami L. Rev.* 1109,1165 (1986)

42. *See also Jones* v. *United States* 463 U.S. 387 (1983) (Brennan, J. dissenting):

> Administration of psychotropic medication to control behavior is common. Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy. *See Mills* v. *Rogers*, 457 U.S. 291, 303, 102 S.Ct. 2442, 2450, 73 L.Ed. 2d 16 (1982); *Rennie* v. *Klein*, 653 F.2d 836, 845 (3d Cir. 1981) *en banc*.

43. *Vitek* actually involved the attempted administration of Thorazine as part of a behavior management program. *See Vitek*, 445 U.S. at 493-94:

> A criminal conviction and sentence of imprisonment exinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to *involuntary psychiatric treatment* without affording him additional due process protection. (Emphasis added.)

While *Vitek* was decided two years before *Mills* v. *Rogers* and *Rennie* v. *Klein* reached this Court, the briefs and the transcript of the oral argument before this Court in *Vitek* demonstrate that forced drugging was a subtext

addressed the issue of forced drugging in similar contexts. *See, e.g., United States* v. *Watson*, 893 F.2d 970, 982 (8th Cir. 1990).[44]

Because of *Harper, Vitek* and the other precedents applying due process to *convicted and sentenced* prisoners, it is clear that *a fortiori* at least equivalent — if not, *additional* — procedures should be required in the context of a *pre-trial* defendant. Indeed, the few federal court opinions in this issue support a careful "right to refuse" judicial review procedure. *See, e.g., Bee* v. *Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985). *See also United States* v. *Charters*, 863 F.2d 302, 313 (4th Cir. 1988), *cert. denied*, 110 S. Ct. 1317 (1990). In this case, however, the trial court's hurried review of the Petitioner's need for the medication, R. 438, failed to meet the standard set by this Court in *Harper*.[45]

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in that case. *See, e.g.*, Brief of Appellee, Larry D. Jones, at 7 ("when such transfer will submit him to chemotherapy"); at 16 ("Once transferred he was forced to take Thorazine, his prescribed medication. When he refused, he was injected with the medication..."); at 20 (regarding "the common use of chemotherapy in mental hospitals" as a danger to transferred prisoners); and Transcript of Oral Argument, Dec. 5, 1979, at 19-20 (prisoner's "right to refuse" medical treatments).

44. In *Watson*, 893 F.2d at 972 the court held that Holmes, one of the two prisoners, could not be medicated against his will without additional due process ("No such hearing has been held with respect to Holmes. No interest would be served in speculating as to whether Holmes presents a danger to his community at this time. We simply hold that if Holmes is presently functioning adequately in the prison setting and does not present a danger to himself, other inmates, or prison staff, the government may not forcibly administer antipsychotic medications").

45. In *Winston* v. *Lee*, 470 U.S. 766, (1985) this Court barred a minimal surgical procedure to obtain evidence, holding: "The medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; the very uncertainty mitigates against finding the operation to be 'reasonable.'" Here, similarly, the dispute over the drugs and their effects is longstanding and ongoing. *See* Parts III A and B above. *See Harper*, 494 U.S. at 226. "There is considerable debate over the potential side effects of antipsychotic medications...." *See also Harper* 494 U.S. at 229 "[I]t is also true that the drugs can have serious, even fatal side effects."

C. Forced Drugging Interfered with Petitioner's Right to Present an Insanity Defense Because The Jury Was Unable To See His Natural Demeanor and Instead Medication Rendered His Demeanor Sedated and Emotionless

The principal issue at trial was Petitioner's defense that he was insane at the time of the crime. There was no evidence that Petitioner was on antipsychotic medication at the time of the crime. At trial he was drugged with medication known and intended to sedate him and deaden his emotions. The drugging interfered with his right to present his own defense, by altering both Mr. Riggins' demeanor and behavior before the court and resulting in the presentation of misleading evidence that totally undermined his insanity defense before the jury.

Demeanor is particularly important in an insanity defense. Courts have universally recognized that, when sanity is at issue, demeanor is of probative value to the trier of fact, which was the jury in this case. *See, e.g., Commonwealth* v. *Louraine*, 398 Mass. 28, 453 N.E.2d 437, 442 (1983). Thus, in *State* v. *Maryott*, 6 Wash. App. 96, 492 P.2d 239 at 242, the court, "When mental competence is at issue, the right to testimony involves more than mere verbalization." The Massachusetts Supreme Court explained the importance of demeanor testimony and the effects of drugging:

> if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. This tendency may render also valueless the defendant's right to testify on his own behalf.

453 N.E.2d at 442 (citations omitted).[46]

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46. *See also State* v. *Maryott*:

> If the state may administer tranquilizers to a defendant who objects, the state then is, in effect, permitted to determine what the

There can be little dispute that what the jury saw of Petitioner in this case was not what the jury heard about from the various witnesses. Instead of a person demonstrably suffering from a major mental illness, *see* Part III A above, as repeatedly described to them, R. 534-35, 711-15, 747, 753, 765, 964-66, what the jury in fact saw here was someone who earlier had been nodding off in court. R. 429-30, 432.

The vital importance of demeanor testimony was demonstrated in a recent study of jurors in death penalty cases.[47] The juror who attached the most significance to a defendant's demeanor in this study described his demeanor at trial as callous and indifferent.[48] In another capital case investigated by this study, jurors influenced by the defendant's demeanor described him as "indifferent to the proceedings" "passive" "emotionless" "no remorse — no anything."[49]

> jury will see or not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury's consideration of his mental condition.

492 P.2d at 242.

47. Geimer & Amsterdam, "Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases," 15 *Am. J. Crim. L.* 1 (1987-88). About one-third of the jurors interviewed said that the defendant's demeanor was a contributing factor in the sentence recommendation, and one juror attributed the verdict entirely to the defendant's demeanor. *Id.* at 51.

48. She said, "Nobody saw a heartbeat of regret. He didn't move a muscle except for crossing his legs. By the time of the penalty phase, the jury was not inclined to feel sorry for him. Minds were already colored." *Id.* at 52.

49. *Id.* at 52.

Passiveness, indifference, and lack of emotion on the part of a defendant are clearly influential in a jury's determination. The scientific literature, discussed *supra*, confirms that Mellaril, especially at the 800 mg. dosage that Petitioner was receiving at trial, has the effect of sedation and flattening of affect and emotional passivity. In this case, Mellaril had the effect of sedating petitioner and flattening petitioner's affect and making him emotionally passive at trial.[50] The real gravamen of Petitioner's argument on the issues of evidence and presumption of innocence is that, by presenting him at trial in such a heavily drugged condition, the State improperly benefitted from making him "look" guilty and unremorseful to the jury, while not permitting him to present freely his own most effective evidence and argument as to the key issue of his mental condition in contradiction of this Court's holdings in such cases as

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50. There is substantial evidence that Mellaril and other related drugs affect intellectual function. Thus, the immediate past administrator of the National Institute of Mental Health has said:

> The findings of this study were ... chronic schizophrenics on thioridazine when compared to placebo subjects showed a definite *dampening* of peripheral indicators of automatic reactivity. In addition, there was a significant reduction to the number of remote and bizarre associations to the word association test in the drug group and an increase in the placebo group. Also, the schizophrenic on drugs showed much less avoidance of threatening verbal stimuli in the perceptual defense battery than did those subjects on placebo.

Judd, Goldstein, Rodnich & Jackson, "Acute Schizophrenia and Phenothiazine" in *Psychopharmacology and the Individual Patient* 83 (1970) (emphasis added). Researchers who have argued that the drugs have no effect on intellectual functioning and cognition have not focused on the issues of sedation and lack of affect. *See, e.g.*, Gutheil & Applebaum, "'Mind Control', 'Synthetic Sanity', 'Artificial Competence' and Genuine Confusion: Legally Relevant Effect of Antipsychotic Medication, 12 *Hofstra L. Rev.*, 77, 91, 203 (1983) (focusing primarily on studies of "the effects of medication on memory, learning and cognition" rather than sedative effects which are barely even addressed).

Morrisette v. *United States*, 342 U.S. 246, 275 (1952) ("(T)his [conclusive] presumption would conflict with the overriding presumption of innocence which the law endures the accused and which extends *to every element* of the crime") (emphasis added). *See also*, *Sandstrom* v. *Montana*, 442 U.S. 510, 520-523 (1979). By altering Petitioner's demeanor and behavior by drugging him at trial, the State undercut both the presumption *and* improperly shifted its burden of proving the requisite mental element for the crime. *Cf. Sandstrom*, 442 U.S. at 524; *Medina* v. *California*, *cert. granted*, 60 U.S.L.W. 3330 (U.S. Oct. 21, 1991) (No. 90-8370).

Studies suggest that evidence actually put on "live" before the jury has a much more persuasive effect than mere expert testimony or other similar "cold" presentation.[51] In the language of social science, this is the so-called "vividness" effect.[52] More colloquially, seeing is believing. Studies of vividness demonstrate how the drugging hampered Mr. Riggins in the critical task of persuading the

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51. *See, e.g.*, Bell & Loftus, "Vivid Persuasion in the Courtroom", 49 *J. Personality Assessment* 659 (1985) "One quality of information that determines its persuasive impact is its vividness. Information can be characterized as vivid to the extent it is '(a) emotionally interesting, (b) concrete and imagery-provoking and (c) proximate in a sensory, temporal or spatial way" (quoting from Nesbett and Ross *Human inference, strategies and shortcomings of social judgment* (1980); Saks and Kidd, "Human Information Processing and Adjudication: Trial by Heuristics," *Law & Soc. Rev.* 121, 138 (1980-1) ("[W]e would predict that the quantitative data of the sociologist would have been *less* persuasive [at trial] than the anthropologist' anecdotal report, because the latter would generally be more concrete and salient, and therefore more accessible").

52. Taylor & Thompson, "Stalking the Elusive 'Vividness' Effect," 89 *Psych. Rev.* 155 (1982) *See also* Shedler & Manus, "Can the Availability Heuristic Explain Vividness Effects?" 51 *J. Personality and Soc. Psych.* 2635 (1986) ("Vividness affected (a) our respondents' recall of material that had previously been presented and (b) their subsequent judgments."); Reyes, Thompson and Bower, "Judgmental Biases Resulting from Differing Availabilities of Arguments," 36 *J. Personality & Soc. Psych.* 2 (1980).

jury that he was not guilty because he was insane at the time of the crime. Just as with "vividness" generally, the great body of authority on the issue of the insanity defense confirms that juries need to be "shown" rather then just told about the defendant's mental illness. In general, public reactions to mental illness are known to be negative[53] and disbelieving and, in particular, there is a wealth of research showing skepticism to, if not outright rejection of, the insanity defense.[54] Given that pre-existing resistance to the fact of mental illness and the claim of exculpation on that basis, there is a particular need for every bit of persuasive "vivid" evidence in such cases.[55]

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53. It is particularly disturbing that this negative attitude continues despite all of the evidence to the contrary. *See, e.g.*, National Institute of Mental Health, *Schizophrenia: Questions and Answers*, (Pamphlet, 1986) at 6:

> Although news and entertainment media tend to link mental illness and criminal violence, studies tell us that if we set aside those persons with a record of criminal violence before hospitalization, mentally ill persons as a whole are probably no more prone to criminal violence than the general public. Certainly most schizophrenic individuals are not violent; more typically, they prefer to withdraw and be left alone.

54. *See, e.g.*, Perlin *supra*, n. 38, 40 *Case W.L. Rev.* at 728 ("The public's hostility to mental illness and the mentally disabled offender arises from a complex combination of sources...") *See also* Friedman, "The Concept of Self in Legal Culture," 38 *Clev. St. L.R.* 517, 528 (1990) ("The insanity defense looked to many people like a loophole....").

55. *See, e.g.*, Fentiman "Whose Right Is It Anyway? Rethinking Competence to Stand Trial in Light of the Synthetically Sane Insanity Defendant," 40 *U. Miami L. Rev.*, 1109 (1986). In *Commonwealth* v. *Louraine*, 398 Mass. 28, 453 N.E.2d. 437, 442 (1983), the court held that, "The ability to present expert testimony describing the effect of medication on the defendant is not an adequate substitute." The court explained:

> At best, such testimony would serve only to mitigate the unfair prejudice which may accrue to the defendant as a consequence of his controlled outward appearance. It cannot compensate for the positive value to the defendant's case of his own demeanor in an unmedicated condition. *Id.*

Here the result of Mr. Riggins' drugging was the very antithesis of "vividness," the drugging — as it is intended to do — produced a narrowed range of emotional responses and reactive behavior. *See, e.g.*, the research studies regarding the effects of Mellaril, Part III A. Like Sherlock Holmes' famous dog that did *not* bark,[56] perhaps the best evidence here that Mr. Riggins was not himself at trial is that there is so little commentary in the record on his behavior or reaction during trial. *See* State of Nevada's Brief in Opposition to the Petition for Writ of Certiorari, at 17.

The drugging's creation of a defendant who was "present" in body, yet "absent" in vital elements of his personality and mental activity, renders the judgment below constitutionally infirm.

56. "Silver Blaze" in Doyle, *The Complete Sherlock Holmes* (1970).

CONCLUSION

For the reasons stated herein, *amicus curiae* Coalition for the FREE respectfully urges this Court to reverse the judgment below.

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No. 90-8466

In The

Supreme Court of the United States

October Term, 1991

DAVID E. RIGGINS,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF AMICUS CURIAE OF THE STATE OF LOUISIANA SUPPORTING RESPONDENT

With Attorneys General Joining for the States of Delaware and Maine

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QUESTION PRESENTED

May a state administer prescribed antipsychotic medication to a mentally ill criminal defendant over his objection if such medicine is necessary to achieve and maintain his competency for trial?

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In The

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BRIEF AMICUS CURIAE OF THE STATE OF LOUISIANA SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

At issue in this case is a State's right to treat incompetent defendants with antipsychotic medication in order to achieve and maintain competency to stand trial.[1] Louisiana Code of Criminal Procedure article (La.C.Cr.P. art.) 648[2] provides for treatment of incompetent defendants to restore capacity to stand trial and thus may be directly

[1] The opinion below is reported at 808 P.2d 535 (Nev. 1991).

[2] La.C.Cr.P. art. 648 (West 1992) is reproduced in the Appendix.

affected by this Court's decision in this case.[3] Attorney General William J. Guste, Jr., of Louisiana files this brief as *amicus curiae* so as to fulfill his statutory obligation to defend the constitutionality of Louisiana statutes.[4]

The States of Delaware and Maine, through their respective Attorneys General, join Louisiana as *amici*

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[3] Additionally, other Louisiana laws could be affected by the Court's decision. *See State v. Plaisance*, 210 So.2d 323 (La. 1968), *cert. denied sub nom. Plaisance v. Louisiana*, 393 U.S. 1005 (1968); *State v. Hampton*, 218 So.2d 311 (La. 1969), and *State v. Lawrence*, 368 So.2d 699 (La. 1979), all approving a defendant's capacity to proceed even though sustained through the use of prescribed medication. Moreover, in a post-conviction setting, Louisiana allows the release of insanity acquittees whose competency is maintained and achieved through the court-ordered use of prescribed medication. *See State v. Collins*, 381 So.2d 449 (La. 1980) and *State v. Boulmay*, 503 So.2d 213 (La. App. 1st Cir. 1986), *writ denied* 503 So.2d 473 (La. 1987). Further, La.R.S. 28:53 K (West 1989) provides, *inter alia*, that patients admitted via emergency certificates "may receive medication and treatment without their consent" and La.R.S. 28:55 I (West 1989) provides the same for judicially committed patients. *See also* La.C.Cr.P. art. 654 (West 1992), authorizing court-ordered treatment of insanity acquittees; La.C.Cr.P. art. 657 (West 1992), authorizing court-ordered release of parolees upon "specified conditions" which could include the taking of prescribed medications; and La.R.S. 15:574.4 H (11) (West 1991), requiring parolees to "[s]ubmit . . . to available medical or psychiatric examination or treatment or both when ordered to do so by the probation and parole officer."

[4] La. Const. art. 4, § 8 (1974) provides the general powers and duties of the Attorney General. La.R.S. 49:257 B (West 1991) provides specifically that the Attorney General, at his discretion, shall represent the interest of Louisiana in defending the constitutionality of a state statute, and La.R.S. 13:4448 (West 1991) provides that the Attorney General must be notified by the state supreme or appeal courts prior to adjudicating the constitutionality of any statute.

because the Court's decision in the case at bar may likewise directly affect their state laws concerning court-ordered mental health treatment of incompetent defendants.[5] Generally speaking, the interest of these several States is similar to the interest of respondent Nevada. The *amici* States, like Nevada, have an obvious interest in seeing that individuals accused of crimes are brought to trial. The States' position is that this compelling state interest overrides a defendant's interest in refusing unwanted medication when such medication is medically appropriate and is necessary to achieve and maintain competency to stand trial.[6] *See Washington v. Harper*, 494 U.S. 210 (1990). *Amici*, therefore, appear before this Court to urge recognition of a State's right to treat incompetent defendants, where medically appropriate, in order to restore mental competency to proceed to trial.[7]

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[5] The *amici* statutorily provide for achieving a defendant's competency to proceed to trial through medication. *See* Del.Code Ann. tit. 11, § 404 (1990); Me. Rev. Stat. Ann. tit. 15, 101-B (4) (1990).

[6] This *amicus curiae* brief addresses only the issue of medicating an incompetent defendant over his objection so as to achieve and maintain competency for trial. Any factual dispute as to whether such medication is necessary for competency in this particular case is left for resolution by the immediate parties to this litigation.

[7] Although not an issue raised by the immediate parties to this litigation, *amici* argue that "synthetic competency" is sufficient competency under *Dusky v. United States*, 362 U.S. 402 (1960), by which an accused would be capable of standing trial. Interestingly, in this case, the petitioner's own *amicus* concedes

(Continued on following page)

SUMMARY OF THE ARGUMENT

Notwithstanding a criminal defendant's liberty interest recognized in *Washington v. Harper*, 494 U.S. 210 (1990), *amici* contend that a State's compelling interest in ensuring a defendant's competency to stand trial outweighs a mentally ill defendant's right to refuse unwanted antipsychotic medication. Accommodating an absolute right to refuse unwanted medication would mean that a State's effort to prosecute a mentally ill offender would depend upon his willingness to accept beneficial medication. As long as the State's right to involuntarily medicate a pretrial detainee is hinged upon a finding that the antipsychotic medication is medically appropriate and necessary for trial competency, a defendant's constitutional right to refuse unwanted medication is neither arbitrarily nor capriciously taken away.

Moreover, a criminal defendant does not possess a right to appear psychotic at trial, and even assuming that such a right exists, that right must bow to the State's countervailing right to try a competent defendant and to ensure dignity and order in the courtroom. While the defendant has alternative means by which to present

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(Continued from previous page)

as much. *See Brief Amicus Curiae Of The American Psychiatric Association Supporting Petitioner* (hereinafter *Brief Amicus-A.P.A.*) at 9, favorably describing Mellaril as a drug that induces competency by controlling psychotic symptoms, and rejecting the aspersion of "synthetic sanity." The A.P.A. also states that antipsychotic medication produces a mental health that is "no different from, no more inauthentic or alien to the patient than, the physical health produced by other medications, such as penicillin for pneumonia" *Id.*

demeanor evidence during trial, the State has no alternative if medication is the only means by which the defendant's competency can be attained.

ARGUMENT

A STATE MAY ADMINISTER PRESCRIBED ANTIPSYCHOTIC MEDICATION TO A MENTALLY INCOMPETENT DEFENDANT WITHOUT HIS CONSENT IF SUCH MEDICINE IS NECESSARY TO ACHIEVE AND MAINTAIN HIS COMPETENCY FOR TRIAL.

Petitioner claims that involuntary medication with antipsychotic drugs violated his constitutional rights in two ways. First, he asserts a general right to be free of antipsychotic medication. Second, he argues more particularly that administration of such medication during trial infringed upon his Fifth, Sixth, Eighth and Fourteenth Amendment rights to present a defense by demonstrating his natural demeanor to the jury at both the guilt and penalty phases of his trial.

Amici argue that, while criminal defendants possess a liberty interest under the Fourteenth Amendment to be free of unwanted medication as established by this Court in *Washington v. Harper*, 494 U.S. 210 (1990), defendants do not have a separate right to appear psychotic at trial. Even assuming that a competent defendant may generally possess a right to be tried while unmedicated, *amici* argue that this right must yield to countervailing state interests when the defendant is incompetent and such medication is necessary to ensuring the defendant's competency at trial. *See Rock v. Arkansas*, 483 U.S. 44, 56 (1987)

(recognizing that a defendant's Fifth, Sixth and Fourteenth Amendment rights may be restricted by a State if such restriction is not arbitrary or disproportionate and is justified by a legitimate state interest); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (recognizing that a defendant's constitutional right to present a defense "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process").

A. The state interest in prosecuting criminal defendants overrides the defendants' liberty interest in avoiding unwanted medication.

In *Washington v. Harper*, 494 U.S. 210 (1990), this Court for the first time addressed the issue of whether a prisoner possessed a protected liberty interest under the Fourteenth Amendment in avoiding the nonconsensual administration of antipsychotic medication. While holding that a competent prisoner does have such a protected interest, this Court further held that such an interest may be outweighed by a competing state interest. As *amici*, the several States concede that a criminal defendant has a liberty interest under *Harper* in avoiding unwanted medical treatment. However, the States' position is that where medication is necessary to render a defendant competent to stand trial, the defendant's liberty interest must yield to the competing state interest in prosecuting the offender for his crime. Just as in *Harper*, where this Court recognized that a State's legitimate penological interest in prison safety and security outweighed the prisoner's right to refuse unwanted medication, so too must a State's interest in prosecution trump a defendant's right to refuse otherwise beneficial mental health treatment.

In the pretrial stage, a State's interest in medicating an incompetent defendant, while categorically different from the state interest asserted in *Harper*, is nonetheless just as legitimate. An accused has a constitutionally protected right to be tried only while competent.[8] *See Dusky v. United States*, 362 U.S. 402 (1960). Louisiana law likewise provides such a right.[9] Accordingly, because States have a compelling interest in bringing to trial those who have been accused of crimes, States have an equally compelling interest in assuring that defendants are competent to stand trial.

The *amici* States submit that a defendant's constitutionally protected interest in refusing unwanted medication cannot triumph over a legitimate state interest in prosecuting criminal offenders. To hold otherwise would thwart the State's ability to enforce criminal laws and would invalidate a host of state statutes which provide for court-ordered medication where necessary for a state interest and beneficial to the individual's mental or physical health. Admittedly, defendants in a pretrial setting have a greater liberty interest in refusing unwanted medication than the convicted prisoner before the Court in *Harper*. But to allow defendants to invoke their incompetency to stand trial as a shield to criminal responsibility,

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[8] This brief will not address the petitioner's argument that he may waive this right and be tried while incompetent.

[9] La.C.Cr.P. art. 641 (West 1992) provides: "Mental capacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense."

and to simultaneously sustain their right to refuse beneficial treatment designed to achieve competency, would be simply unthinkable and unworkable.

Certainly, States have a legitimate and substantial interest in ensuring that as many defendants as possible are brought to trial. Only by trying criminal cases can the State vindicate its interest in punishing those defendants who are found guilty and in exonerating those who are found not guilty. Accommodating a defendant's right to refuse beneficial medication would mean that a State's efforts to prosecute a mentally ill detainee would hinge upon his willingness to submit to treatment. *Amici* argue that enforcing criminal laws is a sufficiently compelling state interest to justify medicating an incompetent defendant over his objection if such medicine is beneficial, medically appropriate, and necessary to achieve and maintain his competency for trial.

Without question, nonconsensual medication of a pretrial detainee is rationally related to the legitimate state interest of ensuring the detainee's competency to stand trial.[10] While admittedly the *Turner v. Safley*, 482 U.S. 78 (1987), test applied by this Court in the *Harper* prison context is not applicable to the case at bar, *amici* contend that this Court should nonetheless apply a reasonableness test to the State's action at issue here. The several States assert that the right to refuse medication is not a fundamental right, and that any state interference

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[10] In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court recognized that a State may restrict the constitutional rights of pretrial detainees if the state regulations are rationally related to legitimate, nonpunitive state interests.

with that right should therefore be subjected only to minimal scrutiny. *See Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, ___, 110 S.Ct. 2841, 2851 n.7 (1990) (suggesting that refusing medical treatment is not a fundamental right: "[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized right of privacy, we have never so held. . . . "). Even if this Court would hold, as the petitioner's suggests, that state interference with the right to refuse medication must be subjected to strict scrutiny, *amici* suggest that such a test is met where medication is necessary to ensure competency to stand trial.

As long as the State's right to involuntarily medicate an incompetent defendant is limited to circumstances in which antipsychotic medication is medically appropriate and necessary for trial competency, the substantive requirements of due process are satisfied. These limitations on a State's right to medicate are narrowly enough tailored so as to serve the compelling state interest in prosecuting a mentally ill criminal offender while simultaneously honoring a defendant's constitutionally protected right to refuse the arbitrary or capricious administration of antipsychotic drugs.

As guardians of our citizens' right to see that criminal laws are enforced, the several States are compelled to speak out against a ruling by this Court which would eliminate a particular class of offenders (i.e. mentally ill pretrial detainees) from criminal responsibility. To allow a mentally ill defendant to choose whether or not he is medicated is to allow him to choose whether or not he should be prosecuted.

Aside from the several States' obvious interest in enforcing criminal laws, the States have a secondary interest in treating mentally ill persons who are within the States' legal custody. *See Harper, infra; Vitek v. Jones,* 445 U.S. 480 (1980); *Estelle v. Gamble,* 429 U.S. 97 (1976). This Court recognized in *Vitek* that "the interest of the State in segregating and treating mentally ill patients is strong." *Vitek,* 445 U.S. at 495. This interest is particularly compelling when the individual has been established as mentally incompetent and is incarcerated prior to trial. Under *Estelle,* a State may be required to treat a mentally incompetent inmate, with or without his consent, in order to relieve suffering caused by his mental disorder. Indeed, a State's refusal to treat a prisoner who is incompetent to make treatment decisions would be "deliberate indifference to serious medical needs of prisoners," and would thereby constitute cruel and unusual punishment. *Estelle,* 429 U.S. at 104.

In *Harper,* this Court did not delineate in what contexts a State may medicate an individual without his consent other than when a mentally ill prisoner is gravely disabled or dangerous. The case at bar gives this Court an opportunity to expand *Harper's* rationale to a pretrial context when medication serves both a defendant's and a State's interests.

B. The constitutionally protected right to present a defense does not include a right to be psychotic before the jury.

Petitioner claims that by overriding his constitutional right to refuse medication, the State of Nevada infringed

upon his constitutional right to present a defense, in violation of the Fifth, Sixth, Eighth[11] and Fourteenth Amendments. Specifically, petitioner maintains that the constitutional right to present a defense includes a right to demonstrate a psychotic demeanor to the jury. *Amici* argue that, regardless of the source of the asserted constitutional right, any such right is outweighed by the countervailing state interest in trying a competent defendant and in ensuring dignity and order in the courtroom. *Amici* contend that requiring a defendant to stand trial while medicated does not substantially interfere with the defendant's right to be given a fair opportunity to present a defense. First, it is not clear that a defendant's demeanor is probative evidence on the issues before the jury at a criminal trial. Second, assuming the relevance of demeanor evidence, even a medicated defendant has the means to present and explain his demeanor to the jury: he may present expert testimony as to the effects of the medication, testify himself, present the testimony of others as to his unmedicated demeanor, or offer other evidence regarding his demeanor.

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[11] Although not argued by the petitioner, *amici* suggest that nonconsensual medication of a pretrial detainee is not *per se* barred by the Eighth Amendment because the medicine itself is beneficial. The administration of antipsychotic medication to mentally ill persons is widely recognized as appropriate mental health treatment despite some possible adverse side effects. *See Brief Amicus Curiae – A.P.A.* at 7. *See also Harper,* where this Court recognized that "the therapeutic benefits of antipsychotic drugs are well documented." *Id.* 494 U.S. at ___, 110 S.Ct. at 1041.

Furthermore, even if medication of a criminal defendant does infringe upon the right to present a defense, such infringement is justified by the State's interest in bringing defendants to trial. The right to present a defense, like other constitutional rights afforded to criminal defendants, is not absolute. In *Taylor v. Illinois*, 484 U.S. 400 (1988), this Court allowed the exclusion of testimony by a material defense witness despite a defendant's Sixth Amendment right of compulsory process as a sanction for defense counsel's violation of discovery. This Court found that the curtailment of the defendant's right to present a defense was justified by the "State's interest in the orderly conduct of a criminal trial." *Id.* 484 U.S. at ___, 108 S.Ct. at 653. In the case at bar, *amici* suggest that preventing a mentally ill defendant from appearing at trial in an unmedicated state is a valid limitation on his right to present a defense considering the State's compelling interest in bringing criminal defendants to trial. As this Court stated in *Taylor*:

> [T]he mere invocation of [the Sixth Amendment right to compulsory process] cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must all weigh in the balance.

Id. at ___, 108 S.Ct. at 655.

Here, as in *Taylor*, the defendant's right to present a defense must bow to the State's interest. Allowing a

defendant to be unmedicated is simply unacceptable when the countervailing State interests in trying a competent defendant and in ensuring order and dignity in the criminal process are at stake.

In balancing the State's interest against the defendant's interest, it is significant that medicating a defendant deprives him of only *one* means by which to demonstrate his mental state to the jury. As noted above, a defendant has several means of presenting demeanor evidence at trial. In contrast, if the State is denied the right to treat an incompetent defendant, the State is deprived entirely of the right to try the mentally ill offender for his crime. Simply put, where medication to achieve competency is at issue, a defendant has alternatives while the State does not. Surely, the minor intrusion on a defendant's right to present a defense occasioned by involuntary medication is amply justified when such medication is necessary to assure the defendant's competency to stand trial.

CONCLUSION

Forcing an incompetent mentally ill defendant to accept medically necessary treatment is not prohibited by the Fifth, Sixth, Eighth or Fourteenth Amendments. The State of Louisiana, as *amicus* in support of respondent Nevada and on behalf of the states of Delaware and Maine, joining as *amici*, respectfully urges this Court

to recognize the several States' legitimate interest in the case at bar.

Respectfully submitted,

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APPENDIX A

La.C.Cr.P. art. 648 (West 1992)

Procedure after determination of mental capacity or incapacity.

A. The criminal prosecution shall be resumed unless the court determines by clear and convincing evidence that the defendant does not have the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the proceedings shall be suspended and one of the following dispositions made:

(1) If the court determines that the defendant's mental capacity is likely to be restored within ninety days by outpatient care and treatment at an institution as defined by R.S. 28:2(28) while remaining in the custody of the criminal authorities, and if the person is not charged with a felony or a misdemeanor classified as an offense against the person and is considered by the court to be unlikely to commit crimes of violence, then the court may order outpatient care and treatment at any institution defined by R.S. 28:2(28).

(2) If the person is charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence, and if the court determines that his mental capacity is likely to be restored within ninety days as a result of treatment, the court may order immediate jail-based treatment by the Department of Health and Hospitals not to exceed ninety days; otherwise, if his capacity

cannot be restored within ninety days and inpatient treatment is recommended, the court shall commit the defendant to the Feliciana Forensic Facility.

B. (1) In no instance shall such custody, care, and treatment exceed the time of the maximum sentence the defendant could receive if convicted of the crime with which he is charged. At any time after commitment and on the recommendation of the superintendent of the institution that the defendant will not attain the capacity to proceed with his trial in the foreseeable future, the court shall, within a reasonable time and after at least ten days notice to the district attorney and defendant's counsel, conduct a contradictory hearing to determine whether the mentally defective defendant is, and will in the foreseeable future be, incapable of standing trial and whether he is a danger to himself or others.

(2) If, after the hearing, the court determines the defendant is, and will in the foreseeable future be, incapable of standing trial and may be released without danger to himself or others, the court shall release the defendant on probation. The probationer shall be under the supervision of the Department of Public Safety and Corrections, division of probation and parole, and subject to such conditions as may be imposed by the court.

(3) If, after the hearing, the court determines the mentally defective defendant incapable of standing trial, is a danger to himself or others, and is unlikely in the foreseeable future to be capable of standing trial, the court shall order commitment to a designated and medically suitable treatment facility. Such a judgment shall constitute an order of civil commitment. However, the

director of the institution designated for the patient's treatment shall, in writing, notify the court and the district attorney when the patient is to be discharged or conditionally discharged.

C. The superintendent of the forensic unit of the Feliciana Forensic Facility shall admit only those persons charged with a felony or a misdemeanor classified as an offense against the person and committed on recommendation of a sanity commission, persons charged with a felony or a misdemeanor classified as an offense against the person and found not guilty by reason of insanity, and persons transferred to the forensic unit from state correctional institutions.